

Summaries of
Decisions
Volume 15
(1986)

**Commercial
Registration
Appeal
Tribunal**



Ontario

88-02113/

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Summaries of Decisions

Volume 15 (1986)



COMMERCIAL REGISTRATION APPEAL TRIBUNAL
SUMMARIES OF DECISIONS * - VOLUME 15
CITED 1986 15 C.R.A.T.

* This volume contains in some instances full decisions and reasons given, and in others summaries only. If reference to the exact decision is desired, application should be made to the Registrar.

Published pursuant to the Ministry of Consumer and Commercial Relations Act, Revised Statutes of Ontario, 1980, Chapter 274, as amended.

THE COMMERCIAL REGISTRATION APPEAL TRIBUNAL

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B-T PROVISIONERS LIMITED
(CLUB GRILL RESTAURANT)

APPEAL FROM THE DECISION OF THE
LIQUOR LICENCE BOARD OF ONTARIO

TO ATTACH A TERM AND CONDITION TO THE DINING LOUNGE
LICENCE AND TO AUTOMATICALLY REVOKE IF THERE IS A
FAILURE TO COMPLY BY OCTOBER 15th, 1985

TRIBUNAL: LACHLAN CATTANACH, Q.C., VICE-CHAIRMAN, PRESIDING
BARBARA J. SHAND, MEMBER
RONALD W. CHEMIJ, MEMBER

APPEARANCES:

S.A. GRANNUM, representing the Liquor Licence Board

No one appearing for the Applicant

DATE OF

HEARING: 24 April 1986

Toronto

REASONS FOR DECISION AND ORDER

This is an appeal by B-T Provisioners Limited, the Licensee of Club Grill Restaurant, 33 Kingston Street, Goderich, Ontario, from the Decision of the Liquor Licence Board of Ontario dated the 10th day of September, 1985, revoking the liquor licence of the Applicant provided the Applicant had not paid arrears of sales tax owing to the Province of Ontario by the 15th day of October, 1985.

A Notice of Proposal was originally issued on May 29th, 1985, whereby the Liquor Licence Board proposed to revoke the liquor licence of the Applicant pursuant to section 10(3) of the Liquor Licence Act because in the wording of the Proposal the Board were of the opinion that the licence holder was not entitled to a liquor licence having regard to its financial position, and it could not be reasonably expected to be financially responsible in the conduct of its business in that it had failed to remit sales tax in the amount of \$5,010.40 to the Ministry of Revenue.

The Licensee requested a hearing before the Liquor Licence Board and the hearing was held on the 10th day of September, 1985. At that time, the Decision of the Liquor Licence Board was that the Licensee shall remit all outstanding monies to the Retail Sales Tax Branch of the Ministry of Revenue on or before October 15th, 1985, and in the event the Licensee fails to comply with the term and condition, the licence will be automatically revoked as of October 16th, 1985.

Counsel for the Board called as a witness this morning Mr. Mervin Moscrop, Supervisor of the Provincial Sales Tax office, who confirmed that the arrears of sales tax have not been paid in accordance with the Decision of the Liquor Licence Board and that the current arrears to date are \$21,202.70. Mr. Moscrop also confirmed that no returns had been filed for the months of January, February and March of 1986 and that an attempt to garnishee the bank account of the Applicant on December 31st, 1985, proved ineffective.

Notice of this hearing was properly served on the Applicant and the necessary affidavits of service have been filed. The Applicant has not appeared this morning to proceed with its appeal and is not represented.

The Tribunal finds that on the basis of the evidence placed before it, the Licensee is in default of payment of retail sales tax in the amount of \$21,202.70 and that the Licensee cannot reasonably be expected to be financially responsible in the conduct of its business.

The Tribunal therefore confirms the Decision of the Liquor Licence Board dated the 10th day of September, 1985, and authorizes the Board to revoke the liquor licence of the Licensee for the said premises forthwith.

553 CHURCH STREET CAFE LIMITED

APPEAL FROM THE DECISION OF THE
LIQUOR LICENCE BOARD OF ONTARIO

TO REFUSE TO ISSUE A DINING LOUNGE LICENCE

TRIBUNAL: LACHLAN CATTANACH, Q.C., VICE-CHAIRMAN, PRESIDING
HELEN J. MORNINGSTAR, MEMBER
ROBERT COWAN, MEMBER

APPEARANCES:

MARK L.J. EDWARDS, representing the Applicant

FERNAND DOUCET, a party, appearing on his own behalf

W. GEORGE KERWIN, a party
appearing on his own behalf and as
President of Monteith Homeowners Association

S.A. GRANNUM, representing the Liquor Licence Board

DATE OF

HEARING: 27 May 1986

Toronto

REASONS FOR DECISION AND ORDER

This is an appeal by 553 Church Street Cafe Limited from the Decision of the Liquor Licence Board of Ontario dated the 5th day of December, 1985, whereby the Board refused to issue a Dining Lounge Licence to the Applicant for the premises known as "553 Church Street Cafe" in the City of Toronto.

The Applicant submitted an application to the Liquor Licence Board on the 15th day of June, 1985, and a public meeting was held by the Board on the 10th day of September, 1985, to consider the application. The Board issued a Notice of Proposal on the 9th day of October, 1985, whereby it proposed to refuse to issue the said Dining Lounge Licence and the Applicant requested a formal hearing before the Board pursuant to Section 11(3) of the Liquor Licence Act. A hearing was held before the Board on the 5th day of December, 1985, and the Board, in its Decision on that date, refused to issue a Dining Lounge Licence to the Applicant.

The first witness called on behalf of the Liquor Licence Board was Fernand Doucet who resides at 2 Monteith Street and whose property adjoins the rear of the Licensee's

property at 553 Church Street. The witness filed as an Exhibit a letter, petition and map. The said letter and petition contained 149 signatures in opposition to the application for the licence and the witness stated that 146 of the persons who signed the said petition resided within a radius of 100 meters of the Applicant's property. The map attached to the said Exhibit illustrated the residential properties in the neighbourhood in red and the witness confirmed that the great majority of the properties in the immediate neighbourhood were residential. The witness had prepared the petition for circulation and the main objections of the petitioners to the licencing of the Applicant's establishment were as follows:

- (a) The undesirable noise generated by the late night operation of this type of business in a relatively quiet neighbourhood.
- (b) The attraction of a late night clientele which, according to both the owner and the manager of the establishment, will require a bouncer at the door to screen out unwanted customers.
- (c) The great increase of traffic in an already congested area where public parking is virtually non-existent after 10:00 p.m.
- (d) The congestion in the surrounding streets which could seriously hamper any emergency action required by the police or the fire department.
- (e) The fact that this type of business in this neighbourhood is not needed, nor wanted and is unacceptable to the residents.

The witness testified that his major concern was with respect to the noise that would be generated. He stated that the Applicant had testified in previous hearings that they would have a bouncer at the door of the premises to screen out undesirables and this created concern on the part of the witness as to what would happen to the undesirables if they were refused admission. The witness referred to an Appendix to the Exhibit which had been filed by him and which appeared to

be a flyer distributed by the Applicant indicating that the premises would be open seven days a week and would serve cafe fare from 10:00 p.m. to 4:00 a.m. nightly. The witness testified that on April 6 of this year, he had called the police at 2:30 a.m. and again at 2:50 a.m. because of excessive noise coming from the Applicant's premises and that more recently, there had been a noise problem at 3:00 a.m., which noise was emanating from the kitchen and was the sound of dishes being washed. He stated that his windows were open because of the warm weather and that the back door to the kitchen of the cafe is kept open most of the time during the warmer weather. The witness confirmed that he had circulated an original petition which was filed with the Liquor Licence Board and dated September 4, 1985 and had obtained the signatures on the said petition. The witness also referred to problems with a fire door opening on a catwalk at the rear of the restaurant.

On cross-examination, the witness confirmed that he had had a discussion with the owners with respect to the disco and that they had agreed that they would not have a disco on the third floor of the premises. The owners had wanted to know the nature of the complaints of the residents of the area and the witness stated that the owners appeared prepared to listen to their complaints and had indicated co-operation. The witness stated that the majority of the people within the immediate area of the Applicant's premises were concerned with the noise problem, but that the parking and late night clientele were the concern of the larger area as well as to the immediate neighbours. He confirmed that the owners had indicated that they would post warning signs within the premises advising that Monteith Street is a tow-away area. He also expressed his concern that the premises would have need for a bouncer. He stated that the other problem in the area was the prostitution problem north of Wellesley Street, but there had been a big improvement in the last six months. When questioned, the witness stated that he knew that the Applicant's premises would cater to the gay community but he stated that many gays who lived in the area were opposed to the granting of the licence and had signed his petition. The witness stated that he was not bothered by the gay community. The witness stated that he did not agree that there was no hard evidence that the late night crowd would create a nuisance and that the existence of a bouncer might alleviate any problem inside the premises but would create a further problem outside the premises when these people are refused admission. He stated that the music emanating from the premises created problems, especially the thumping of the bass. He confirmed

that he had been advised that steps had been taken to soundproof the premises but that the problems had not been solved. The witness stated that there was a vibration problem in addition to the noise problem and that there had been no solution to the noise problem since the prior hearing.

The next witness called on behalf of the Board was George Kerwin, who resides at 20 Monteith Street and is the Chairman of the Monteith Homeowners Association. He stated that the majority of the premises within 100 meters of the Applicant's restaurant are residential and that the noise from the restaurant could be heard as far as 150 meters. He stated that he was very concerned about the late hours of operation and he also referred to the flyer indicating that the premises would be open until 4:00 a.m. The witness stated that the residents in the area, including the members of his Association, were still concerned about noise from the premises, traffic and the noise from patrons leaving the premises at a late hour. He stated that the gay question was not an issue and was not relevant and he had no prejudice with respect to sexual orientation. He stated that soundproofing does not do much when the doors to the premises are left open.

On cross-examination, the witness confirmed that he had made no personal complaints with respect to noise and he confirmed that in his meeting with Mr. Hilton, the President of the Applicant corporation, he had been told that they would be prepared to do whatever soundproofing is necessary.

The next witness called on behalf of the Liquor Licence Board was Mark Skypas who had been an Investigator with the Board for approximately five years. He stated that there is no restriction on the hours of operation for a dining lounge licensee and that they are only required to cease the sale of liquor at 1:00 a.m. He stated that he had made an inspection of the premises and found the first floor to be a bona fide restaurant with the second floor consisting of a lounge with sofas and coffee tables together with the potential for a wet bar. He stated that the third floor was a disco but that things were very quiet when he left at 12:15 a.m. The witness stated that in conversation with the disc jockey, he was told that things got going after the other places closed.

The next witness called was Elvin Martin who was the City of Toronto Alderman for Ward 6 and the Applicant's premises are situate within his Ward. He stated that this was a common problem in that it was difficult to locate late night entertainment establishments which would be compatible with the

uses of the area. He stated that this area was a unique mixture of low rise and high rise and that there was little commercial activity north of Wellesley Street after 11:00 p.m. He stated that he was of the opinion that the granting of a licence to the Applicant in this mainly residential area would alter the character of the neighbourhood and that problems arise even if an establishment is well run. He stated that patrons leaving this type of establishment create noise which disturbs the residents and creates problems of compatibility of use. He stated that the municipality was attempting to redefine areas for late night uses as proposed by the Applicant. He stated that once an Applicant received a liquor licence, it was very difficult to control the use and the municipality had no authority to control the hours of operation. He stated that he felt that it was necessary to intervene on a liquor application at the time of the application rather than attempt to respond to complaints after a licence had been issued. He felt that this was a question of public interest and that the issuing of the licence was not in the public interest. On cross-examination, the witness confirmed his concern with respect to the disco and he confirmed that he had made no canvas of the area other than in the immediate Monteith and Gloucester Street area.

The next witness called on behalf of the Board was Jean de Boerr who resides at 4 Monteith Street, immediately beside Mr. Doucet. She confirmed that a great deal of noise came from the dances at the community centre at 519 Church Street and that she had often complained about this noise. She stated that there was a great deal of noise from the Applicant's premises at 553 Church Street and that because of the noise, she was unable to sit on the deck at the rear of her premises. She stated that her deck was approximately 24 feet from the fire escape at the rear of the Applicant's premises and she also stated that, in addition to the noise problem, she was bothered by the smell of food from the restaurant. She stated that the noise from the dance floor is a concern to her and that it was hard for her to sleep. She stated that she had lived at this location for 20 years and wanted to be able to have the right to quiet enjoyment of her home.

On cross-examination, the witness confirmed that she had not made any complaints about the noise but stated that she had not complained because Mr. Doucet, her neighbour, had already complained to the authorities.

The last witness called on behalf of the Board was William Copps who resides at 22 Monteith Street. He stated that he had not been bothered by noise emanating from the

premises but that when the property had been previously operated as an illegal "booze can" with people leaving as late as 5:00 a.m., the patrons leaving at these late hours always created problems. On cross-examination, he acknowledged that he had no reason to believe that the present owners would break the law. He stated that he had not been involved in meetings with Mr. Doucet and Mr. Kerwin. He confirmed that the community centre at 519 Church Street is a nuisance but that the fact that it closes at 1:00 a.m. made a difference to him.

The first witness called on behalf of the Applicant was Peter Bochove who is the Manager of the Applicant's premises at 553 Church Street. He had had previous experience for approximately nine years as manager of several establishments in Toronto and stated he had had no problems with respect to his operation of the prior establishments and had had no previous liquor violations. He described to the Tribunal the details of the operation and particulars of the menus together with the particulars of the types of customers who attended at the premises. He confirmed that consulting engineers had been retained with respect to the soundproofing problems and that further soundproofing was to be done to the premises. He stated that a ventilation fan had been installed and that it was one source of noise. He confirmed the need for a bouncer together with a doorman in order to check proof of age and to escort out any undesirable patrons. He stated that in his meetings with the area residents, they had discussed the premises as a potential haven for prostitutes and the insulation problems and he confirmed that at the second meeting, the concerns of the residents were apparently not alleviated. He stated that he attempted to address the concerns by installing additional sound insulation and to encourage the patrons not to park on Monteith Street. He stated that there had been no complaints from the police with respect to congestion in the surrounding streets. The witness filed a petition containing 562 signatures, together with a map of the area and he stated that the petition had been obtained from patrons signing the petition in the cafe. The witness testified that 320 of the persons who signed the petition lived within the area from Yonge Street to Jarvis Street, and from Isabella Street to Carlton Street.

On cross-examination, the witness confirmed that he had been convicted of the operation of an illegal "booze can" operation at 553 Church Street, and he confirmed that some of the signatories to the petition were from outside Toronto. He also confirmed that none of the petitioners in support of the application for the liquor licence resided within 100 meters of

the restaurant. The witness confirmed that there was only a kitchen on the first floor and that it would be necessary to carry food to the second and third floors, but that food would be available on all three floors. He stated that he would have no concern with respect to compliance with the food/liquor ratio as required by the Liquor Licence Act and that the bulk of food sales would occur between 2:00 a.m. and 4:00 a.m.

The next witness called on behalf of the Applicant was Peter Maloney, a lawyer practising in the area who had known the prior witness since 1973. He stated that he had been able to observe various establishments managed by Mr. Bochove and he considered him to be a good bar manager who was able to control bad elements in difficult situations. He stated that he had been to the Applicant's premises once or twice a week for some considerable period of time and that it is a small place which is tastefully decorated.

The next witness called on behalf of the Applicant was George Hislop who identified himself as a leader in the homophile community. He stated that he was a shareholder in Crispin's Restaurant and the Selby Hotel, both licensed premises, and that he had known Mr. Bochove for 15 years in his capacity as a restaurant and dining lounge manager, and that in his opinion, Mr. Bochove had had no management problems. The witness described the type of clientele who would attend the premises and he indicated that between 11:00 p.m. and 2:00 a.m., the patrons would be mainly people in the hospitality business who were spending some of their own time at this location. He stated that the area from Bloor Street to Carlton Street and from Bay Street to the Don River was the greatest concentration of gays in Canada, and he stated that there were only 18 licensed establishments in Toronto catering to gays.

On cross-examination, in reply to a question as to why so many gays had signed the petition in opposition to the granting of a licence, he stated that the statements contained in the petition were prejudgmental. He confirmed that there was no shortage of licensed establishments within the immediate area but that persons might not choose to go to these other places. He confirmed his understanding that the big problems were the question of sound and noise level and the hours of late closing. He acknowledged that he would be as concerned as the neighbours who lived only 24 feet away if he resided at this location.

The last witness called on behalf of the Applicant was Roy Hilton, the owner of 553 Church Street Cafe Limited. He stated that he was a real estate appraiser who had purchased

553 Church Street as an investment and that when a prior tenant had vacated, the property had been empty for approximately a year. He had then leased the building to Mr. Bochove, but when he discovered that it was being used as an illegal "booze can", he immediately locked it up. He then arranged to hire Mr. Bochove as the General Manager for the new restaurant which he had constructed. He stated that Mr. Bochove had good references from the restaurant and dining lounge industry and that he made a good partner. He stated that he had made many improvements to the building and had a total investment of approximately \$750,000.00. He stated that basic soundproofing had been done but was not yet finalized, but he was prepared to provide further soundproofing if a Dining Lounge Licence is issued. He also confirmed that fire alarms would be installed to prevent the problems with respect to the rear fire door. He stated that he would have to remain open until 4:00 a.m. because of economics but would close at 2:00 a.m. if required.

In argument, counsel for the Board stated that the granting of a licence in these circumstances was not in the public interest having regard to the needs and wishes of the public and that no licence should be granted. He argued that if there was an application with respect to unlicensed premises with a prior poor track record, this created a greater onus on the Board to refuse the application for a licence and that greater weight must be given to the objections of people in the immediate area. He stated that the premises had been open for only a two-month period but during that time, there was continuous opposition which indicated that the residents of the area did not want licensed premises at this location. He stated that the needs and wishes of the people in support of the application can be supplied by other licensed establishments, and that 95 per cent of the residents within a 100 meter radius of the Applicant's premises are opposed to the issuance of the said licence. Counsel referred to the problems which would be caused by the dance floor, the evidence of open doors, kitchen noise and the problems of people leaving the premises at a late hour and he referred to the evidence of two witnesses who were located only a few feet away from the rear of the licensed premises. He stated that the opponents have satisfied the onus as required under Section 6(1)(g) of the Liquor Licence Act in that the issuance of the licence is not in the public interest having regard to the needs and wishes of the public in the municipality in which the premises is located.

Mr. Doucet, one of the parties to the proceedings, reiterated that the matter was a community concern of the many residents who had objected and who reside within 100 meters of

the Applicant's premises. He stated that their main concern is the noise coming from the music, from people leaving the premises, from traffic and from undesirable clientele who are stopped at the door. He stated that it is not the function of the Liquor Licence Board to issue licences in order to satisfy the financial requirements of the Applicant but rather in order to fulfill the needs of the community and that in these circumstances, the Dining Lounge Licence should not be issued since the great majority of residents in the immediate area are opposed. Mr. Doucet stated that the residents did not want channels for complaint, rather, they wanted no reason for complaint.

Counsel for the Applicant argued that the opponents to the application for the licence are the most directly affected but they are not the only persons involved. He stated that the municipality is much broader in nature and that the Tribunal must take into account the interest of all persons within the community, both residential and commercial. He argued that the case is not won or lost on either petition and that the Applicant's petition should be given weight. He stated that the area was already a mixed residential/commercial zone and that there must be a balance of the interest of the residents knowing of the commercial area with proposed commercial ventures in the area. He stated that the Applicant had shown good faith and was prepared to agree to reasonable terms within economic limits. He stated that the noise factor was the most important concern and that the parking or prostitution problems were of no real importance. He stated that the need for a doorman demonstrates a good business sense and that Mr. Hilton and Mr. Bochove are the type of people who are willing to obey the law as it is in their best interests to fulfill the concerns of the community. He stated that the purpose of the bar was to create a club atmosphere for the gay community which needed these particular facilities. Counsel argued that it would be better to have premises with a liquor licence as opposed to premises which were not subject to regulation under the Liquor Licence Act.

An application for a liquor licence in a mixed residential/commercial area often creates the problem of weighing the rights of the Applicant to receive his licence while, at the same time, weighing the nature and extent of the objections by the residents living within the area; such is the case in this hearing. However, after reviewing all of the evidence in this matter, the Tribunal finds that the Applicant is not entitled to a Dining Lounge Licence for the said premises because, in the view of the Tribunal, the issuance of

the licence is not in the public interest having regard to the needs and wishes of the public in the community in which the premises is located as provided in Section 6(1)(g) of the Liquor Licence Act. Petitions have been filed by both the Applicant and the objectors, but the Tribunal is of the opinion that greater weight should be given to the petition of the objectors in that the majority of the people signing the petition in opposition to the application for the licence are residents within a radius of 100 meters of the premises and the Tribunal is of the opinion that the right of these residents to the quiet enjoyment of their neighbourhood would be adversely affected. The concerns of these residents should not be overshadowed by the concerns for the patrons. The physical layout of the building makes it difficult to operate three floors as a dining lounge with only a kitchen on the main floor and there is every indication that the intention is to operate the said premises during the period from 10:00 p.m. to 4:00 a.m. seven days a week as a disco and club, and the Tribunal finds that this type of operation would adversely affect the rights of the residents in the area. The Tribunal accepts the evidence that there are presently serious noise problems and that they have not been alleviated to any extent since the time of the hearing before the Liquor Licence Board and, in fact, have been of greater concern during the summer months. Previous Decisions of this Tribunal have always given greater weight to the concerns and problems of the immediate neighbourhood as opposed to the rights of individuals in the broader community as a whole and the same principle applies in this hearing. This establishment has been operating without a licence for a short period of time, but problems have occurred almost immediately with the adjoining residential neighbours.

Accordingly, by virtue of the authority vested in it under Section 14(3) of the Liquor Licence Act, R.S.O. 1980, Chapter 244, the Tribunal confirms the Decision of the Liquor Licence Board dated the 5th day of December, 1985, whereby it refused to issue a Dining Lounge Licence to the Applicant for the premises at 553 Church Street, Toronto, Ontario.

566595 ONTARIO LIMITED
(CHEATERS TAVERN)

APPEAL FROM A DECISION OF THE LIQUOR LICENCE BOARD
TO ATTACH A TERM AND CONDITION TO THE DINING LOUNGE
LICENCE

TRIBUNAL: STEPHANIE J. WYCHOWANEC, Q.C., CHAIRMAN, PRESIDING
HELEN J. MORNINGSTAR, MEMBER
RONALD CHEMIJ, MEMBER

APPEARANCES:

RONALD BIRKEN, representing the Applicant

S.A. GRANNUM, representing the Liquor Licence Board

DATE OF

HEARING: 16 January 1986

Toronto

REASONS FOR DECISION AND ORDER

This is an appeal by 566595 Ontario Limited, Licensee of premises called Cheaters Tavern from a decision of the Liquor Licence Board dated the 28th day of August, 1985, wherein that Board imposed a term and condition on the Licensee by ordering that "the sale of alcoholic beverages shall cease at 10:00 p.m. daily commencing September 9, 1985 and continuing until otherwise ordered by the Board".

The term and condition was imposed because the licenceholder, having a dining lounge licence only, had failed to meet the requirements of the Act and the Regulations in that the sale of liquor had exceeded 60 per cent of the total sales of liquor and food in the licensed premises.

The Regulation in this regard is quite specific. It is contained in section 9(6) of the Regulation to the Liquor Licence Act and it reads as follows:

In each premises for which a dining room or dining lounge licence is issued, the total receipts from the sale of food in any month shall not be less than 40 per cent of the total receipts from the sale of liquor and food in that month and a daily record showing the sales of liquor and food shall be maintained.

The Tribunal has reviewed the evidence presented to it on behalf of the Liquor Licence Board and by the Applicant to this hearing, and although we agree and accept that the Licensee has taken some positive steps to achieve a proper food/liquor ratio, the fact of the matter is, that he has not succeeded. Exhibit 8 which was extrapolated from the record submitted by the Licensee and the information obtained by the investigator for the Liquor Licence Board indicates that for the period January 1985 to July 1985, the food/liquor ratio was well below the required 40/60 level. It is to be expected that when the records for the balance of that year are filed, the 40 per cent ratio will not be met. Indeed it appears from the evidence of Mr. Mara, the actual sole owner of the company, that the 40 per cent ratio cannot be met under present operating conditions.

Having said that, the Tribunal cannot overlook the blatant contravention of the Act and the Regulation and it is therefore of the opinion that the imposition of a term and condition is appropriate. The Tribunal confirms the Decision of the Liquor Licence Board except to add that the term and condition shall remain in force until the appropriate food/liquor ratio is reached or until an entertainment lounge licence under the Liquor Licence Act is obtained, and directs the Board to set the commencement date of the said term and condition. *

*Note: The above decision was appealed to the Supreme Court of Ontario (Divisional Court) by 566595 Ontario Limited (Cheaters Tavern). The appeal had not been concluded at the time of this publication.

502377 ONTARIO LIMITED
(CABARET RESTAURANT)

APPEAL FROM THE DECISION OF THE
LIQUOR LICENCE BOARD OF ONTARIO

TO REVOKE THE DINING LOUNGE LICENCE

TRIBUNAL: LACHLAN CATTANACH, Q.C., VICE-CHAIRMAN, PRESIDING
F. THOMAS PEOTTO, MEMBER
RONALD W. CHEMIJ, MEMBER

APPEARANCES:

THEODORE B. ROTENBERG, representing the Applicant

S.A. GRANNUM, representing the Liquor Licence Board

DATE OF

HEARING: 11, 12, 13 June, 1985

Toronto

REASONS FOR DECISION AND ORDER

This is an appeal by 502377 Ontario Limited from the Decision of the Liquor Licence Board of Ontario dated the 22nd day of January, 1985, whereby the Board revoked the dining lounge licence of 502377 Ontario Limited for the Cabaret Restaurant at 85 Bowes Road, Concord, Ontario, effective February 10, 1985.

The Applicant is the Licensee of the premises known as Cabaret Restaurant located at 85 Bowes Road, Units 1 and 2 (Concord) Vaughan, Ontario, and the said dining lounge licence was transferred to the Applicant in June of 1982. The Liquor Licence Board issued a Notice of Proposal on the 4th day of October, 1984, to revoke the said licence pursuant to Section 10(3) of the Liquor Licence Act because, according to the Proposal, the past conduct of the officers and directors of the corporation affords reasonable grounds for belief that its business has not and will not be carried on in accordance with law, honesty and integrity in that the Licensee by its officers and employees permitted drunkenness to take place on the licensed premises, it had filed with the Board false statements of the sales of food and liquor in the premises and because the licensed premises were not under experienced management and supervision so as to maintain an orderly operation. The Applicant requested a formal hearing before the Board pursuant to Section 11(3) of the Liquor

Licence Act and a hearing was held on the 25th day of October, 1984. The Board, by its Decision dated the 22nd day of January, 1985, revoked the said dining lounge licence and the licensee appealed their Decision to this Tribunal.

The first witness called on behalf of the Liquor Licence Board was Police Constable John Lucas of York Regional Police who gave evidence as to various incidents which occurred near the Cabaret Restaurant premises. He gave evidence as to the arrest and conviction for impaired driving of various persons who had driven from the Cabaret parking lot on various occasions and who admitted to the police officer that they had been drinking in the Cabaret. There was no evidence other than the admissions of the various accused as to where they had been drinking. Constable Lucas did give evidence of his attendance with other officers on the evening of March 22, 1984, where he was involved in the arrest of two persons, namely Richard Dukart and Bill Purtell who were charged under Section 45(4) of the Liquor Licence Act with being intoxicated in a public place and both of whom were convicted. The cross-examination of the witness confirmed that with respect to the various charges of impaired driving which were laid by him, he was depending on the admissions of the accused persons as to their source of alcohol and he had made no separate investigations.

The next witness called on behalf of the Board was Constable David Trach of the York Regional Police. Constable Trach gave evidence of various persons who were stopped while driving motor vehicles leaving the parking lot of the Cabaret Restaurant or in the vicinity of the restaurant who were charged and convicted of driving with greater than 80 milligrams of alcohol per 100 millilitres of blood contrary to Section 236 of the Criminal Code as it was at that time. Constable Trach was also involved in the arrest and conviction of two persons outside of the entrance of the Cabaret Restaurant, one of whom had a bottle of beer in his hand, who were charged and convicted of being intoxicated in a public place. On cross-examination, Constable Trach confirmed that he would not go into the Cabaret tavern after laying the charges against the various accused and he confirmed that the focus of his investigation would be on the behaviour and condition of the driver. He stated that it would have to be an extraordinary event to cause him to return to the Cabaret tavern.

The next witness called on behalf of the Board was Constable Paul Carlsen of the York Regional Police who was involved in an investigation at the Cabaret tavern on November 5, 1983. It appears that a patron of the tavern, Mario Cortuleuchi, had a verbal confrontation with Stephen Joseph Glazebrook, an employee of the tavern, and Cortuleuchi was assaulted by Glazebrook. It appears that he was struck and knocked to the floor and that some other unknown person kicked him. Constable Carlsen confirmed that the charge of assault laid against Glazebrook was withdrawn after a total of six adjournments. On cross-examination, the police officer confirmed his conversations with Cortuleuchi, who advised him that he could not identify the person who had kicked him and that it could have been another patron.

The next witness called was Constable William Davis of the York Regional Police who gave evidence with respect to an assault in the Cabaret Restaurant against a patron, Eric Morris, on the 2nd day of March, 1984. Mr. Morris was apparently assaulted by Francisco Darpino, an employee of the Cabaret, and as a result of the assault Morris suffered a broken jaw. The statement of Darpino given to the police officer was introduced as an exhibit in these proceedings. Darpino was convicted of two charges of assault relating to the said incident. On cross-examination, the police officer confirmed that he had not spoken to the management of the Cabaret Restaurant with respect to the incident and that the focus of his investigation was on the actual assault. He confirmed that the defence raised by the accused at his trial was that the injury was an accidental injury and that this had not been accepted by the trial judge.

The next witness called on behalf of the Board was Constable William Miller of the York Regional Police. He investigated an assault by Francisco Darpino, the above referred-to employee, who apparently assaulted and injured two patrons of the Cabaret, Peter Hawrylak and Lerov Manners, on April 13, 1984. Hawrylak suffered an abrasion to his cheek and a swollen eye. It appears that his friend, Manners, had spoken with one of the dancers who was performing at the time and, in turn, was spoken to by Darpino who escorted both of them from the premises. The police officer confirmed the evidence of Hawrylak who stated that when he turned to speak to Darpino, he was hit and knocked to the ground and kicked four to five times. Darpino's defence was that he thought that he might be hit by the patron and he, therefore, hit the patron first. It was confirmed that Darpino was the same person who was involved in the March 2 incident with Eric Morris. The police officer confirmed that Darpino was convicted of assault and fined \$300.00.

On cross-examination, Constable Miller confirmed that the trial had proceeded summarily and that the accused was not represented by defence counsel. The police officer confirmed that he spoke to Malcolm Conjiers who was the Night Manager in the Cabaret at the time and Conjiers confirmed that Darpino had removed the patrons because he did not want them standing up.

The next witness called on behalf of the Board was Constable Ronald Laing of the York Regional Police. Constable Laing testified with respect to an incident which occurred on July 13, 1984, when a patron of the Cabaret Restaurant, Howard Taylor, was allegedly assaulted by Paul Malagerio, an employee of the Cabaret, on the premises. Constable Laing testified that on August 9, 1984 he served a summons on Malagerio charging him with assault. He advised that the accused had appeared on a preliminary hearing and had elected a trial by judge and jury, but that to his knowledge no trial date had been set. The police officer referred to a statement given by the patron, Taylor, who stated that he was at the Cabaret with a friend, John Hicks, having a few beers. Taylor stated that he approached one of the exotic dancers and asked her to perform a table dance. Apparently, he was requested on several occasions not to stand and he stated that he was suddenly punched in the face without warning and knocked down. He stated that he was kicked several times and was dragged outside of the restaurant. Mr. Taylor stated that he was treated in the hospital for rib injuries resulting in his ribs being taped. He also suffered two severe cuts in the mouth. The police officer advised that he took a statement from John Hicks, a friend of Taylor who was with him at the time, who corroborated the evidence of Taylor.

On cross-examination, the police officer confirmed that he was reading from a Crown brief which had been prepared by him and he confirmed that this was anticipated evidence. He stated that Taylor was a man of about 55 years old who was approximately six feet tall and weighed 210 pounds. He stated that he had no knowledge of Taylor's behaviour when drinking. He confirmed that Hicks was smaller and older. He stated that there was indication that a second bouncer or doorman who was an employee of the Cabaret was involved in the incident but that Mr. Sit, the proprietor of the Cabaret, had instructed Malagerio not to provide any information to the police. He confirmed that the focus of his investigation was on the assault incident and not on the Cabaret Restaurant. He also confirmed that Malagerio was the Assistant Manager, and that he was about five feet ten inches tall and weighed approximately 180 pounds.

The next witness called on behalf of the Board was Detective Armand LaBarge of the York Regional Police. He was involved in the investigation of an assault which occurred on September 28, 1984 against Brian Downey, a patron of the Cabaret Restaurant. As a result of this investigation, three doormen, all employees of the Cabaret, were arrested and charged. They were Antonio Sotera, Casendra Sotera and Robert Marcos. Detective LaBarge testified that Mr. Downey had been drinking in the Cabaret and that one of the nude dancers had been performing a table dance for him. It appears that Downey attempted to kiss her buttock and was immediately apprehended by one of the bouncers who escorted him outside to the parking lot in front of the Cabaret. The police officer stated that the evidence was that all three accused men returned outside and that in the confrontation which followed Downey was knocked to the ground and was kicked by both Antonio Sotera and Casendra Sotera while Robert Marcos, the third bouncer, held the other patrons back. Detective LaBarge confirmed that Downey was then left on the ground and was subsequently taken to the hospital suffering from very severe head injuries. The evidence of Detective LaBarge was that Downey had been in a coma for several months and was still in a coma. Detective LaBarge confirmed that Paul Malagerio was in charge of the restaurant at the time of this incident and that he was the same employee who had been involved in the assault and injury to Howard Taylor. Apparently, Mr. Sit was not in the premises at the time. Detective LaBarge stated that Malagerio advised that he did not see any part of this incident because he was at the back of the restaurant premises ejecting a patron from that area. When he returned, he could not find any of his bouncers on the floor of the restaurant and when he located them outside, he ordered them back in. He stated that he had no knowledge of the Downey incident. Detective LaBarge stated that there had been a preliminary hearing held in Provincial Court in Newmarket and that all three accused had been committed for trial.

On cross-examination, Detective LaBarge confirmed that in his evidence he was referring to the Crown brief which had been prepared by him and Constable O'Grady and that they had jointly been involved in the preparation of the Crown brief. He stated that Constable O'Grady had listened to the evidence given at the preliminary hearing and that Detective LaBarge was not at the hearing and did not have a transcript of the evidence. He acknowledged that the Crown brief may be different from the evidence which is ultimately given at the trial of the three accused. The police officer stated that some of the witnesses had signed statements and he had had the

benefit of reading these statements. He stated that a witness named Lound confirmed that all three bouncers came out of the premises at the same time. He stated that Downey had asked him to go back into the Cabaret to get Downey's friends. Detective LaBarge also stated that he had interviewed Gary Merritt who claimed that he had been assaulted in the parking lot of the Cabaret, but that he did not know who hit him. Detective LaBarge confirmed that Malagerio had been questioned and that the questions and answers were taken down by Constable O'Grady. Detective LaBarge confirmed that two other police officers were in the Cabaret Restaurant when the Downey incident occurred and that they were Detective Peter Thompson and Constable David Ground. He stated that some witnesses came forward to confirm that they had witnessed the events on the evening of September 28 and that others had contacted the police at a later date. In addition, Detective Thompson had located some witnesses through a licence plate number. The officer stated that Downey was apparently escorted out of the premises by Tony Sotera and that Sotera had acted properly at this time, but that it appears that the assault occurred after Downey had been ejected although the period of time which passed had not been noted.

The next witness called on behalf of the Board was Constable Terry Creighton of the York Regional Police. His first testimony concerned an incident on March 6, 1984, when he was in the Cabaret parking lot and he discovered one, Douglas Bert, asleep in his car in the parking lot. Bert was given a breathalyzer test and he blew 220, substantially in excess of the legal limit of 80 milligrams of alcohol per 100 millilitres of blood. Constable Creighton stated that Bert was quite intoxicated and that he admitted that he had been drinking in the Cabaret Restaurant. He was convicted and sentenced to 21 days in jail.

Constable Creighton gave evidence of a further incident on March 24, 1984, when he observed a motor vehicle driven by one, Paul Kay, leaving the Cabaret Restaurant parking lot quickly. He was given a breathalyzer test and as a result was charged and convicted under Section 236 of the Criminal Code. He had readings of 130 and 120 parts of alcohol, respectively. He was sentenced to 21 days in jail.

Constable Creighton gave evidence of a further incident which occurred on April 25, 1984, when he observed a car leaving the parking lot of the Cabaret. The driver was stopped and ultimately given a breathalyzer test which resulted in two readings of 210 parts of alcohol. He was convicted under Section 236 of the Criminal Code and fined \$200.00.

On May 5, 1984, Constable Creighton observed a motor vehicle leaving the Cabaret parking lot driven by James Irwin who was charged and convicted of impaired driving and fined \$300.00.

On May 10, 1984, Constable Creighton observed a motor vehicle leaving the Cabaret parking lot which vehicle was driven by Daniel Giffen. Giffen acknowledged that he had been drinking in the Cabaret and a breathalyzer test confirmed readings of 120 parts of alcohol. He was convicted under Section 236 of the Criminal Code and sentenced to 14 days in jail.

On May 12, 1984, Constable Creighton observed a motor vehicle leaving the Cabaret parking lot driven by Douglas Reynolds who confirmed that he had been drinking in the Cabaret. A breathalyzer test confirmed readings of 130 parts of alcohol, but Constable Creighton advised that this charge was dismissed.

Constable Creighton gave evidence with respect to an incident on May 30, 1984 when he was in the Cabaret parking lot and saw a car leave the lot and stop on the road. The motor vehicle was driven by Craig Meyers who was behaving in a very loud manner. When requested to take a breathalyzer test, he refused. Constable Creighton stated that the accused was convicted of refusing to take a breathalyzer test and was fined \$650.00.

Constable Creighton gave evidence of eight other incidents involving persons either driving motor vehicles or in the care and control of motor vehicles who were apprehended either in the Cabaret parking lot or as they left the parking lot. These incidents occurred during the period from May 30, 1984 to September 22, 1984 and, according to Constable Creighton's testimony, six of the accused were convicted of alcohol related driving offences. One was released on a 12 hour suspension and the eighth case is still before the Courts.

On cross-examination, Constable Creighton confirmed that he was taking his information from the arrest reports and that the records of conviction with respect to all of the charges referred to by him in his testimony were recorded by the Crown. He stated that he was not in Court and that the information was taken off of the dope sheet. He was questioned with respect to the incident of May 5 relating to Gordon Lewis and he stated that he remembered these facts very well due to the condition of Lewis and the problems that he had getting him

out of the car. He stated that he usually asked an accused driver where he had been drinking, but that the answer of the accused as to how much he had to drink was not reliable. Constable Creighton stated that one of the accused confirmed that he had been drinking in more than one place. He stated that when he was on patrol, he would sweep the parking lots of various licensed premises to check for impaired drivers before they got on the road. He confirmed that his notes with respect to the various persons charged and convicted did not indicate where the accused had been drinking. He also confirmed that unless there had been a reference in his report, he would assume that there had been no erratic driving on the part of the accused.

The next witness called by counsel for the Board was Adele Downey, the mother of Brian Downey. Counsel for the Applicant objected to her as a witness on the grounds that she could only express opinion evidence. The Tribunal agreed to her being called as a witness on the basis of her evidence being limited to medical evidence with respect to the injuries suffered by her son. She testified that he had been sent by ambulance to York Finch Hospital and when he lost consciousness, he was transferred to Humber Memorial Hospital where he remained in intensive care for three weeks. He was then transferred back to York Finch Hospital and remained in the hospital until February 25, 1985. He was in a coma for a period of approximately three months. The witness stated that Downey now suffers from post-traumatic amnesia and is conscious but has lapses of memory and suffers from some paralysis on the right side. He is again learning to walk and is taking speech therapy and is presently in West Park Lodge.

It was agreed by counsel that the transcripts of evidence of Police Constable Michael Flemming from the trial of Mr. Sit and 502377 Ontario Limited in the Provincial Court where they were charged with a breach of the Liquor Licence Act would be admissible in these proceedings. Constable Flemming gave evidence of the events of March 22, 1984, when he attended at the Cabaret Restaurant. The witness testified that he was dressed in blue jeans, T-shirt and was not in uniform. He stated that he was sitting at a table facing the entrance and adjacent to a long table where there were approximately six persons seated. He confirmed that Mr. Sit was in the premises at the time and was either behind the bar taking money from the waitresses or was assisting in the serving of liquor. He also moved about the restaurant during the course of the evening conversing with floor men and waitresses and other persons in the tavern. The witness gave specific evidence as to the

conduct of Bruno Kanasawi, Patrick McNeil, David C. Potter, Darren T. Kozeyah and Randolph Rivers, all of whom were seated at the adjoining table. The police officer gave evidence as to their state of intoxication and in his opinion all of the said parties were intoxicated and that subsequent to his observations of intoxication, they continued to be served by the staff members of the Cabaret. The witness confirmed that Kanasawi, Potter, Rivers and McNeil were all charged with being intoxicated in a public place contrary to Section 45(4) of the Liquor Licence Act and included in the evidence filed with the Tribunal were the certificates of offence with the convictions entered in each case. The transcripts of the evidence of the witness go at length to his cross-examination as to the state of intoxication and the conditions of the various parties. There were six additional certificates of offence filed as exhibits charging six other persons with the same offence on the same date and specifying the offence to have occurred in the Cabaret tavern and a total of ten persons were convicted for the same offence on that date.

The first witness called on behalf of the Applicant was Nalin Nathwani who had been employed as the General Manager of the Cabaret Restaurant until May 31, 1985. He stated that included in his duties was the responsibility to keep records of the day-to-day operations of the Cabaret and he reported to the owners who were always there daily. He was also responsible for the liquor filings and he confirmed in his evidence that the reports filed with the Liquor Licence Board for the months from and including March of 1984 to July of 1984 re the food/liquor ratio were false. He stated that the total sales were correct, but that the ratio had been falsified on instructions from the owners. He stated that as a result of a C-string by-law in Brampton and the closing of Studio 134 in Markham, there was a substantial increase in business and this adversely affected the ratios. The witness stated that he started with the Cabaret in August of 1983. The witness identified Exhibits, numbers 12 and 13, which were filed showing the calculations of actual food/liquor sales for the period from October 19, 1984 to May 25, 1985, together with a graph of sales for the period from November of 1983 to November of 1984. He stated that after the Liquor Licence Board had discovered the false records, an application was immediately made by the owners for an entertainment licence. The witness then discussed various promotions which were offered by the Cabaret including a free table dance if food was ordered, a cover charge of \$2.00 redeemable against food and a promotion to provide free french fries if beer was ordered. He also gave evidence as to the buffet provided by the restaurant at noon and for the period from late afternoon until closing.

The witness gave evidence as to his responsibility for the hiring of staff including doormen and floor managers. He stated that an application form must be filled out and that he would be responsible to check the references of the Applicants. He stated that he set the rules for the employees and that these rules were posted on a board. He advised that the doormen and floor persons were told to be polite but firm. He stated that when he was on duty, he would be on the floor at least 60 per cent of the time. He stated that references would be checked out by telephone and that staff meetings were held once a month, at which time any problems were discussed. He also discussed problems in his office with respect to individual employees. In selecting a doorman, he would look for experience together with recommendations from other members of the staff. He stated that doormen were instructed to escort any patrons who were not behaving properly from the premises and that they were told only to use force as a last resort. He stated that he only knew of one person who appeared to use excessive force and that he was employed for only one week.

On cross-examination, the witness stated that the fact that the food/liquor ratio was shown as exactly 60/40 for several months was merely coincidental. He also confirmed that the main food sales were at lunch time and from approximately 6:30 p.m. to 8:00 p.m., but that little food was sold after that time. He stated that he probably had checked the references of Darpino and Malagerio, but he could not specifically recall that. He stated that he did not recall the incident of March 2, 1984 when Darpino was charged with assault, although he confirmed that Darpino had been suspended for one week. The witness also stated that he did not ask questions with respect to any problems in the parking lot at staff meetings. He stated that there were no rules regarding the treatment of patrons but reiterated that force would be used in the discretion of the doormen and the floor managers, but only if necessary.

The next witness called was John Sit, one of the proprietors of the Cabaret Restaurant and an officer and shareholder of 502377 Ontario Limited. He stated that he came to Canada in 1972 and had previously been a manager of a restaurant in Hong Kong. He obtained a Degree of Bachelor of Commerce from the University of Toronto and purchased the Cabaret in 1982. He stated that he had worked for the previous owner for a period of six months before acquiring the business. He testified that the staff were given specific instructions with respect to the over-consumption of alcohol by patrons and that the waitresses must not serve such patrons.

They were instructed to look out for the type of behaviour including such signs as their method of conversation and the manner in which they were conducting themselves. The witness stated that he was usually present from 4:30 in the afternoon until closing time at 1:00 a.m. every night. The employment of the doormen was usually checked by the Floor Manager and the General Manager, and their manner and experience and the way in which they presented themselves to customers, as well as the fact that they must be in good physical shape, were all points that were taken into account in employing doormen. He stated that all were instructed to talk first and only use physical force as a last resort. He also stated that the doormen and other employees were warned not to go outside the actual premises of the restaurant. He referred to the plan of the premises which indicated that there are no windows looking on the parking lot. He stated that there was always a congestion problem around the front door at night. Mr. Sit stated that if a waitress or doorman had a particular problem, he would have a person-to-person meeting with them and that special meetings of the staff would be held if there were serious incidents. He stated that there had been some meetings with respect to the problem of the over-serving of patrons.

The witness advised that he was present in the restaurant at the time of the Glazebrook incident and was in the kitchen at the time. He stated that he was only aware of the Darpino incident of March 2 when he saw Mr. Darpino in the cruiser and he asked why he was being taken away. He confirmed that he arranged for and paid for Mr. Darpino's defence to the charges arising out of the March 2 incident. He stated that it was the policy of management that if an employee was on duty and inside the premises, management would pay for their defence with respect to any charges laid against them. He stated that with respect to the second Darpino incident of April 13, he had no knowledge of the incident as it had not been reported to him and he did not pay for Darpino's defence.

With respect to the Malagerio incident of July 13, 1984, the witness stated that he was on the premises at the time but did not see the actual incident. Malagerio told him that Taylor was standing in the hallway area and refused to move. When Malagerio took action to physically set him down, Taylor got aggressive and Malagerio proceeded to pull a T-shirt over his head.

The witness stated that he had had a lot of trouble with the York Regional Police and that he felt they did not like his presentation of entertainment. He stated that between

150 and 170 charges had been laid against the dancers with respect to their performances, but that there had been no convictions. He stated that there had been no complaints before the incident of March 10, 1984 when between 30 and 40 police officers came to the premises. The witness stated that he had had no complaints with respect to excessive force against the patrons. He stated that he was present when Malagerio was served with a summons by the police and that he did advise him not to say anything.

The witness testified that he was on duty in the Cabaret at the time of the Downey incident, but that he was in the coffee shop and that Paul Malagerio was in charge as Floor Manager which included the responsibility for the entertainment, the dancers and the waitresses. He had no firsthand knowledge other than that he had been advised by Malagerio when he returned to the restaurant that a drunk had been picked up by an ambulance, and he only learned of the seriousness of the injuries on the following Saturday afternoon. He stated that at the time of the incident, Marcos was supposed to be on the door. He confirmed that he was paying the cost of Marcos' defence but not for the Soterias. He stated that Marcos had actually tried to stop the fight. The witness stated that he would not pay for the Soterias' defence because they had broken the rules by fighting outside. The witness also stated that there had been no previous indication that the Soterias would use excessive force and that in his opinion, neither Darpino nor Glazebrook were guilty of using excessive force. He had no comment with respect to Malagerio.

On cross-examination, the witness confirmed that his knowledge of the Downey incident was to the effect that two police officers had found a drunk in the parking lot and had called an ambulance. He acknowledged that he was familiar with the regulations of the Liquor Licence Act and that the Cabaret was classed as a restaurant and was responsible for the sale and service of meals to the public. He reiterated that the door charge of \$2.00 was not a cover charge but that it was a food charge and that there was a large sign to that effect. He confirmed that the coupon for the food charge could be redeemed on the evening of purchase or at any other date, or that the coupon could be given to another person. When asked about the use of physical force, he stated that it was necessary to remove a patron in certain circumstances and that sufficient force to do so would be used. The witness stated in answer to a question with respect to the discussion at staff meetings of violence that the matter had never been discussed at any meeting. He stated that the entertainment dancers

performed on the stage unless they were performing a table dance at the request of the customers, at which time they would be a distance of approximately one to two feet from the customers. They were prohibited from making any physical contact. He stated that the removal of the G-string is in the discretion of the dancer. The witness acknowledged on cross-examination, that between November of 1983 and July of 1984, there were at least five incidents involving assaults on or injuries to patrons. He also confirmed that the Soterias, Marcos and Darpino all left the employment of the Cabaret shortly after the date of the Downey incident.

The next witness called for the Applicant was Azad Rajan who is a co-owner of the Cabaret Restaurant and he confirmed that he entered into partnership with Mr. Sit in 1982. He stated that he had no disagreement with the evidence of Mr. Sit. He confirmed that the employment procedure for doormen was to check out their references but that usually he depended on watching their behaviour for a couple of weeks. He stated that Paul Malagerio was involved as a partner in a karate and judo club. The witness was very emphatic that the Cabaret had not employed doormen who had a propensity for the use of violence. He stated that since the Downey incident, they had used an independent agency to check out any Applicants for the position of doormen or bouncers. When questioned about the food/liquor ratio, the witness stated that if the Cabaret was unable to employ the food charge program and the combined french fry sales with beer, they would be unable to meet their ratio because they had too much liquor business and he stated that the proper solution was for the Cabaret to obtain an entertainment lounge licence. The witness stated that he was responsible for the restaurant for the shift from 10:00 a.m. to 6:00 p.m. each day and that this was his full-time occupation. He stated that there had been no complaint to him by either the police or any patrons of the use of excess force and that there had been no complaints prior to March 10 re the number of impaired drivers. He stated that police officers, usually in plain clothes, were in meetings from time to time, at which time there had been some discussion with respect to the ejection of patrons. He stated that the effect of the March 22 incident made all of them aware of the seriousness of the charges. He stated that none of these problems arose in the daytime and that it was not necessary to have doormen on duty during the day.

On cross-examination, the witness confirmed that the Cabaret Restaurant would not meet the food/liquor ratio requirements of the Liquor Licence Act if there were no promotions. He stated that management had no intention to change the type of operation because it was a successful operation at this time. It had between 32 and 35 employees, including both full-time and part-time employees and this included four full-time doormen and three part-time doormen. He stated that there were no incidents arising between the patrons and the dancers during his daytime shift.

The next witness called on behalf of the Applicant was Detective Sergeant Peter Thompson of the York Regional Police Department. He stated that he was in the premises on the evening of September 28, 1984 with Police Constable Grimes and that he was in plain clothes making a routine check of the premises. He stated that he was standing by the bar when he observed an incident in the area to the right of the bar where an exotic dancer was performing a table dance with her back to a patron. She suddenly straightened up and slapped the patron on the face. The dancer picked up the table and pushed it towards the patron but did not hit the patron. She appeared upset and walked away. The witness stated that Tony Sotera went over and spoke to the patron and escorted him out of the premises side by side. Sergeant Thompson identified the patron as Brian Downey and he confirmed that no physical force was used up to that point. Downey passed within one foot of him and he stated that Downey was not intoxicated, but that he had a silly grin on his face as if he were amused. The witness stated that he saw no sign of warning which would raise an alarm in his mind and saw nothing unusual in the premises. The witness stated that he and the other officer started to leave when a patron made a comment about an incident which had occurred outside. He stated that two of the doormen were standing outside by the door and that they were Casendra Sotera and Mr. Marcos. Tony Sotera was about 45 yards down in the parking lot arguing with a number of people getting into a car. He stated that Tony Sotera made a comment, apparently for his benefit, "come on you fellows - no more fighting". The witness felt that this was a staged comment. As the people got into the car, one of the passengers shouted back an obscenity and the police officer took down the licence plate number and referred it to Detective LaBarge the next day as he was in charge of the Downey investigation. The witness stated that he noticed a person lying on the ground about ten feet west of the door to the Cabaret and that he was subsequently identified as Brian Downey, but Detective Sergeant Thompson did not identify him at that time as the person in the tavern. He appeared to be

unconscious apparently from liquor and he could not be awakened. The police officer moved him over to a grassed area and asked Paul Malagerio, the Manager who was outside, to call for an ambulance. He stated that there were no signs of a serious assault and when he asked Tony Sotera what had happened, Sotera replied that the people in the car had been involved with the person lying on the ground. However, two witnesses then approached and stated that the doorman had struck Downey and this was confirmed by another witness. Detective Sergeant Thompson was involved in the arrest of Casendra Sotera the next day and he was advised by Mr. Sit in a conversation with him that Mr. Sit offered to obtain a lawyer for Sotera. On cross-examination, the witness stated that he did not see Sotera return to the tavern after escorting Downey out and that he was physically a large person. He stated that he had seen people being ejected from the tavern from time to time.

The next witness called on behalf of the Applicant was Paul Malagerio who had been previously employed by the Floor Manager at the Cabaret. He stated that he had been dismissed from his position on the day after the last hearing before the Liquor Licence Board and he acknowledged that he was upset about the firing and had been subpoenaed to testify before the Tribunal. He confirmed that he was a karate expert for fifteen years and had the status of a "black belt". He stated that he taught common sense self-defense. The witness testified with respect to the Taylor incident and stated that Taylor had been asked several times to be seated and that he appeared to be intoxicated and was interfering with a dancer as she performed a table dance. The witness stated that Taylor resented being asked to sit down and kept wandering around and finally took a swing at Malagerio who pushed him into a chair. Malagerio took Taylor outside and stated that it was not necessary to use force at that time. The witness stated that the atmosphere within the Cabaret was very frustrating to many male customers and that at least four fights had broken out on the evening of the Taylor incident. He stated that he would grab the patrons and put them outside and would remove them by physical force. The witness stated that it was necessary to use force at the Cabaret more often than most places where he had been employed in the past. He stated that it was very frequently necessary to use force to escort people out. He always instructed the doormen that the use of force would be a last resort and acknowledged the rules of conduct issued by the Cabaret to all new doormen. He stated that a potential doorman must be able to handle his job and that he had been involved in several staff meetings to

discuss the procedure to be followed by doormen. The witness stated that he had been the Floor Manager on the night of the Downey incident but that he did not see the ejection of Downey. He stated that he was involved in ejecting a patron from the rear door who had been jumping on the stage. He stated that he was doing his usual rounds and saw that the doormen were missing and went looking for them. He went outside after Detective Sergeant Thompson and saw Downey on the ground and phoned for an ambulance.

On cross-examination, the witness stated that he had been employed with the Cabaret from May of 1984 until November of 1984. He stated that often the Cabaret was very crowded and that frequently dancers would be touched by the customers and that the owners were aware that this was going on. He stated that Mr. Taylor appeared to be intoxicated and that patrons frequently would become intoxicated especially in the later hours. He stated that if a customer was intoxicated but was not known, he would not be served any further liquor. During the period of his employment, the witness stated that Mr. Sit was only present at one meeting and that he had only been involved in two meetings, one in August and one after the Downey incident. The witness testified that Malcolm Conjiers, who had been the Floor Manager until August of 1984, told him to make a point if someone touched a dancer. He stated that many times, if a person touched a dancer, he would be followed out into the parking lot and would be struck. The witness reiterated that the owners were aware of the dancers being touched by the patrons on a regular basis.

The next witness called on behalf of the Applicant was Michael Buffy who was the proprietor of a small restaurant in Scarborough. He stated that he had worked for the Cabaret as Floor Manager from June of 1983 to February of 1985 mainly on the evening shift and that he was responsible for the supervision of the floor staff and doormen including their hiring and firing. He stated that he would look for a clean-cut individual with the ability to talk and in good physical shape. He stated that his specific instructions were that physical force would only be used as a last resort and that if a doorman used excessive force, he would be fired. He stated that, if a doorman was involved in the use of force, there would be a discussion after the event and he would be put on a two-week probation period. He stated that force was not used on a regular basis and probably no more than once a month. He stated that most people who were asked to leave left on a voluntary basis. The reasons for being asked to leave were mainly because of intoxication, language or the

touching of dancers. He stated that pushing and shoving would happen quite often, especially in a large bar, but that at the Cabaret, he would not have to use force every night. He stated that if a patron is cut off by a waitress, she advises the doorman, the person is permitted to finish his drink and then asked to leave. He stated that he was on duty on the evening of March 22 when the police made their major investigation and that the staff had been serving the patrons properly that night. He stated that none of the patrons alleged to be drunk were shown to him. The witness denied any knowledge of Malcolm Conjiers' testimony re patrons who had touched dancers being followed into the parking lot.

On cross-examination, the witness stated that his job was not to supervise the parking lot but only the Cabaret and that he did not check on the doormen going outside. He stated that if there was a busy night and he had to escort a lot of people out, then there would be a discussion with the staff but this discussion would usually be only with the doormen. He stated that the main problem was excessive consumption and a second problem was the live entertainment. The witness stated that if a fight broke out, the doormen were instructed "no head shots - just body shots".

The next witness called on behalf of the Applicant was Malcolm Conjiers who had been the Floor Manager of the Cabaret and had been employed from March of 1984 until August of 1984. He stated that he left on good terms and for personal reasons. He stated that the policy of the Cabaret was that intoxicated patrons must be refused service. If they were not rowdy, they could finish their drink. He stated that if a patron touched a dancer, he would immediately be escorted out and that the owners did not turn a blind eye. He stated that the use of force was prohibited until it reached the point of self-defence. He testified that he never saw any incidents of excessive force and that on the odd occasion, force would be used only for self-defence. He stated that fights were very uncommon and that there were never any brawls. The witness stated that there were never three or four forcible ejections in one evening and not even three or four fights in a month. He stated that his instructions to the doormen were that he preferred them not to be in the parking lot, but that they might have to escort a dancer to her car. The witness denied that he had ever been involved in any assault on a patron. On cross-examination, the witness stated that he had been on the day shift for the last two months. He stated that occasionally a patron would try to touch a dancer and that there would be an occasional bad night but no scuffles.

The next witness called on behalf of the Applicant was Susan Crosby who was a waitress at the Cabaret and had been on duty on the evening of March 22, 1984. It was agreed by counsel that her evidence with respect to the events of March 22, 1984 would be by the transcript of the evidence from the criminal charges and copies of the transcript were to be provided to the Tribunal. She gave evidence generally as to the policy with respect to an intoxicated patron and that the doormen would escort patrons out when they would not leave on their own. The witness stated that, in her opinion, the presence of table dancers does not excite the patrons and that there was no problem with the level of violence in the Cabaret. She stated that she was aware of only three incidents of a scuffle between a patron and a doorman since the start of her employment in November of 1983, and she advised that she had no knowledge of the Glazebrook or Darpino incidents, or any of the other incidents. The witness stated that there was a staff meeting approximately every two months, at which time they would discuss general problems such as uniforms, the failure to eject patrons and other staff problems. The witness stated that on the evening of March 22, she did not serve any intoxicated persons, but that that episode had made her more aware and that she had been watching the patrons far more closely since that time. The witness stated that she had worked the evening shift in March and April of 1984, but had no recollection of any of the incidents referred to in the testimony of the various witnesses before the Tribunal.

Mr. Rajan was recalled on behalf of the Applicant and he stated that there had been no criminal charges since the Downey incident and no other charges of any kind. However, on cross-examination, he stated that he was aware of a charge against Michael Buffy for assault in November of 1984 and that Rick Taylor, the disc jockey, had been charged with assault in the same incident. He stated that Paul Malagerio had been discharged the day after he had testified before the Liquor Licence Board.

The only additional evidence presented before the Tribunal were the transcripts of the evidence given by Susan Crosby and Maria Gosetto as witnesses for the defence, which transcripts of evidence, after some considerable delay, were delivered to the Tribunal. The witnesses were waitresses in the Cabaret Restaurant on the evening of March 22, 1984 and they gave evidence in Provincial Court as to the events of that evening. A summary of their evidence was to the effect that up to the time of the appearance of the police officers,

there were no unusual events such as fighting or people creating disturbances and that, in their opinion, none of the customers whom they served were creating any problems of any kind.

In argument, counsel for the Board referred to Exhibit 10 which had been filed before the Tribunal which confirmed the filing of false statements with respect to the food/liquor ratio for the period from March of 1984 to July of 1984, inclusive. He referred to the evidence that the instructions re the filing of the false statements came from the owners to the General Manager of the restaurant and was the first indication that the Applicant had not carried on its business in accordance with integrity and honesty. The Tribunal was referred to the case of Re: Don Howson Chev-olds Limited (1974) 6 O.R. (2d) 39. This case, which was dealing with the Motor Vehicle Dealers Act, stated that the manner in which officers and directors of a corporation handle their employees is most relevant to Section 5(1)(c) of the Act. Counsel alleged that these actions in themselves were sufficient to justify revocation of the liquor licence.

Counsel for the Board proceeded to deal with the evidence relating to the excessive use of force by employees of the Cabaret against the patrons and he referred to the various incidents where patrons were injured or alleged to have been injured as a result of confrontations with the doormen and bouncers. He referred specifically to the Downey incident, the Malagerio incident and the two Darpino incidents, and pointed out that the second Darpino incident occurred approximately one and one-half months after the first incident, but Darpino was still employed by the Cabaret. Counsel alleged that there was no justification for the amount of force used as all of these patrons had suffered serious injuries. He referred to the fact that the owners were paying the legal fees with respect to the defences of the employees and should be fully aware of the implementation of the force policy. Reference was made to the evidence of the three doormen who were called and gave evidence that force was used only if necessary, but referred to the specific evidence of the one witness who stated that his instructions were to use body blows only with no "head shots". Counsel argued that the officers and directors of the corporation must have known that a continuation of this policy of force would ultimately result in severe injury. He referred to the opinion given by the witness Conjiers that one of the convictions was wrong which indicated no attempt on the part of management to restrain or change their policy of force.

Counsel for the Board referred to the evidence of the incident of March 22 and the conviction of the various patrons, together with the many impaired charges which were laid against persons leaving the Cabaret. He also referred to the adult entertainment and, in particular, the table dancers as being an important part of the operation and the fact that management did not want any change. He argued that the environment created by the nude dancers combined with the liquor licence created a greater onus and responsibility on the part of management to protect those patrons who may have lost their inhibitions. He argued that it appeared that it was more important to management to protect their dancers than it was to protect the welfare of the patrons of the restaurant.

Counsel referred to the decision of the Tribunal in Re: Tramps Restaurant (1984), vol. 13, page 17 in the Tribunal's Decisions and commented upon the similarity of the two appeals. The combination of violence and intoxication created an onus on the Licensee to be extra careful because of the circumstances. He submitted that there was a need to show a deterrent and give a message to other Licensees and that the evidence before the Tribunal was sufficient to justify the revocation of the liquor licence.

Counsel for the Licensee acknowledged that the Downey incident was the most serious of all the grounds alleged but that the specific actions of the employees outside of the premises does not justify the loss of the licence. He stated that the evidence before the Tribunal indicated a vendetta on the part of three people, i.e., the three doormen, initiated on their own and there was nothing to indicate the reason for the attack. He submitted that this was not an indication of a lack of proper management. He argued that the owners were businessmen who were attempting to operate their business in a proper manner and that there was nothing to indicate that the managers and doormen would not properly enforce the rules. He stated that a distaste for the entertainment policy of the Cabaret does not detract from the right to carry on a legitimate business and he disagreed that there was a need for a higher onus because of naked dancers. He stated that the same standard is applicable to all Licensees. He acknowledged that it might be harder to achieve that standard but that the standard, itself, is not higher. Counsel argued that the Licensee is not a guarantor and that the use of excessive force is not a reason for revocation. He alleged that the evidence of five or six incidents by themselves do not lead to a conclusion that there was a lack of supervision. He argued that the burden of proof is on the Board to show a lack of

supervision and that the Board had not satisfied that burden. Counsel alleged that the facts were entirely different in the decision of Re: Tramps in that management in that case had not met the terms and conditions, had continued to show persistent violations and that the police had made efforts to bring the abnormal incidents to the attention of management. He argued that the penalty of revocation was very rare and that there were only two such revocations to his knowledge. He stated that there must be repeat violations of serious matters in order to justify revocation. Counsel referred to the decision of the Tribunal in the appeal of Tweedsmuir Hotel (Westport Limited), Volume 11, page 68, and on the basis of that decision, argued that the evidence of the conviction of various patrons for impaired driving outside the Cabaret could not be construed as evidence that the Licensee was permitting drunkenness on the premises.

Counsel for the Licensee also argued that the Applicant was being subjected to double jeopardy under the Charter of Rights in that it had been acquitted in Provincial Court of a charge of permitting drunkenness contrary to Ontario Regulation 581 Section 8(4) of the Liquor Licence Act, which charge specifically referred to the incidents of March 22, 1984. Counsel referred to two cases, the first being Regina v. B & W Agricultural Services Limited, et. al., 3 C.C.R., 54, where the defendant was charged with the offence of having no licence under The Aeronautics Act where there had been a previous hearing before the Air Transport Committee and the Judge in the Provincial Court proceedings stayed the prosecution on the grounds of double jeopardy. The second case referred to was Regina v. Wrigglesworth, 9 C.C.R., 47, where a police officer was charged with common assault after having been found guilty and fined before a police tribunal. The Saskatchewan Court of Appeal held that there was no double jeopardy and that a single act may give rise to more than one legal consequence. Counsel for the Applicant argued that in the Regina v. Wrigglesworth case the charges were different charges laid under two different sections, one charge having been laid under The Royal Canadian Mounted Police Act and the second charge having been laid under the Criminal Code. Counsel argued that in this appeal the same section of the Regulations of the Liquor Licence Act and incident is used in the same proceedings and that the decision in the B & W Agricultural Services Limited case should apply.

There are three allegations made in the Notice of Proposal of the Liquor Licence Board issued on the 4th day of October, 1984 which are as follows:

1. Contrary to Section 8(4) of Regulation No. 581/80, the Licence holder, by its officers and employees, permitted drunkenness to take place in the licensed premises.
2. Contrary to Section 8(15) of the said Regulation, the Licensee has filed with the Board false statements of the sales of food and liquor in the premises.
3. Contrary to Section 8(15) of the said Regulation, the licensed premises is not under experienced management and supervision so as to maintain an orderly operation.

The Tribunal accepts the argument of Counsel for the Licensee in view of the fact that the Licensee was charged in Provincial Court under Section 8(4) of the Regulation with permitting drunkenness but, after an extensive trial, was acquitted of this charge, it would be subject to double jeopardy if this matter was dealt with by the Tribunal. We would point out that the hearing before the Liquor Licence Board was held on October 4, 1984 and the Judgment of the Provincial Court was handed down on January 15, 1985, which was before the Decision of the Liquor Licence Board issued on the 22 day of January, 1985. The Tribunal, therefore, finds that based on the Judgment rendered by the Provincial Court with respect to the March 22, 1984 incident, the Licensee had not permitted drunkenness to take place in the licensed premises.

With respect to the various incidents relating to persons charged and convicted of driving with greater than 80 milligrams of alcohol per 100 millilitres of blood, the Tribunal finds that this in itself is not sufficient evidence that the Licensee permitted drunkenness to take place in the licensed premises contrary to Section 8(4) of the Regulation and the Tribunal refers to its decision in the Tweedsmuir Hotel appeal. The Tribunal accepts the argument of Counsel for the Licensee that a conviction of impaired driving or blowing over 0.80 is not automatically evidence of intoxication since a person could be impaired for the purposes of driving a motor vehicle without being intoxicated.

The Tribunal finds that upon the evidence filed and upon the admissions of the witnesses of the Licensee, false statements of the sales of food and liquor in the licensed premises were filed with the Liquor Licence Board contrary to Section 8(15) of the said Regulation. The Licensee has admitted that it falsified its food/liquor ratio records for the period from and including March of 1984 to and including July of 1984. One of the exhibits filed with the Tribunal was a report of an investigator of the Board filing the results of the monitoring of the food and liquor sales of the premises for two days on July 20, 1984 and July 21, 1984, which confirmed total food sales for July 20 to be five per cent while liquor sales were 95 per cent of total sales and the food sales on July 21 being three per cent of total sales while liquor sales were 97 per cent of total sales. There was also evidence by one of the principals of the Licensee whereby he admitted under cross-examination that if the Cabaret was unable to employ the food charge program and the combined french fry sales with beer, they would be unable to meet their ratio and he stated that the proper solution was for the Cabaret to obtain an entertainment lounge licence. One of the exhibits filed with the Tribunal was the food/liquor ratio sales for the period from October 19, 1984 to June 1, 1985, and virtually every week from April 13 to June 1, indicated food sales to be 40 per cent of total sales and liquor sales to be 60 per cent of total sales.

The final matter as set out in the Proposal was the question of whether the Licensee was operating its business contrary to Section 8(15) of the Regulation in that the licensed premises were not under experienced management and supervision so as to maintain an orderly operation and this allegation revolves around the excessive use of force by the employees of the Licensee. After reviewing all of the evidence with respect to the various incidents resulting in serious injuries to several patrons, including the very grave injuries to Downey and the evidence of the present and former doormen and floor managers of the Cabaret, the Tribunal finds that there was not proper supervision of the employees and that the Licensee was in contravention of Section 8(15) of the Regulation. The Tribunal finds that excessive force was used on several occasions. The Tribunal recognizes that Paul Malagerio was a hostile witness in that he had been fired immediately after the last hearing before the Liquor Licence Board and the Tribunal has taken this into account in reviewing his evidence. However, his evidence as to the atmosphere within the restaurant and the problems of violence were confirmed by the Licensee's witness, Michael Buffy, who

did not appear to be a hostile witness, and he confirmed the evidence of Malagerio with respect to the atmosphere in the premises and acknowledged the problems of excessive consumption and the type of live entertainment. This witness also confirmed the policy of force when he acknowledged on cross-examination, the instructions to the doormen, "no head shots - just body shots". The evidence also appears to substantiate the allegation that management was more interested in protecting the dancers than it was in protecting the patrons.

The Tribunal rejects the argument of the Board that because of the type of adult entertainment there was a greater onus placed on the Licensee. The Tribunal finds that there is no greater onus or responsibility than on any other Licensee but if the Licensee creates an environment by the type of entertainment it provides, such as nude dancers, there is a greater responsibility on the Licensee to satisfy that onus.

The Tribunal finds that the policy of excessive force was carried on either with the implied consent of management or with management shutting its eyes to what was actually going on. There was also the blatant disregard of the Regulation with respect to the food/liquor ratio which occurred as a result of the direct instructions of management to falsify the records. The records speak for themselves. It has been argued that revocation of a licence is far too severe a penalty, but the Tribunal is of the opinion that there is sufficient evidence to justify the revocation of the licence in this case. All Licensees within the industry must be shown that the use of violence and excessive force cannot be tolerated and that the implied consent to the use of such force, combined with a blatant disregard of the ratio requirements, justifies the revocation of the dining lounge licence.

Accordingly, by virtue of the authority vested in it under Section 14(3) of the Liquor Licence Act, R.S.O. 1980, Chapter 244, the Tribunal confirms the Decision of the Liquor Licence Board dated the 22nd day of January, 1985 revoking the dining lounge licence of 502377 Ontario Limited for the Cabaret Restaurant, Concord, Ontario, and directs the Board to set the effective date for such revocation. *

* Note: The above decision was appealed to the Supreme Court of Ontario (Divisional Court) by 502377 Ontario Limited. The appeal had not been concluded at the time of this publication.

476535 ONTARIO LIMITED
(J.B.'S CORRAL RESTAURANT)

APPEAL FROM THE DECISION OF THE
LIQUOR LICENCE BOARD OF ONTARIO

TO ATTACH A TERM AND CONDITION TO THE
DINING LOUNGE LICENCE

TRIBUNAL: LACHLAN CATTANACH, Q.C., VICE-CHAIRMAN, PRESIDING
KENNETH VAN HAMME, MEMBER
ROBERT COWAN, MEMBER

APPEARANCES:

DAVID E. WATERHOUSE, representing the Applicant

S.A. GRANNUM, representing the Liquor Licence Board

DATE OF
HEARING

16 October 1985

Toronto

REASONS FOR DECISION AND ORDER

This is an appeal by the Licensee from the Decision of the Liquor Licence Board of Ontario dated the 21st day of March, 1985, whereby the Board attached a "Term and Condition" to the dining lounge licence of the Licensee with respect to its premises known as "J.B.'s Corral Restaurant" at 6282 Lundy's Lane, in the City of Niagara Falls, requiring that the sale and service of alcoholic beverages in the licensed premises shall cease at 10:00 p.m. daily.

The Licensee had originally applied for an entertainment lounge licence to take the place of the presently existing dining lounge licence and on the 26th day of October, 1984. The Board issued a Notice of Proposal to refuse to issue the entertainment lounge licence and to attach the said "Term and Condition". As a result, the Licensee gave notice requiring a hearing which hearing was held before the Board on the 26th day of October, 1984. By a decision dated the 18th day of December, 1984, the Board reserved its decision with respect to the application for the entertainment lounge licence and the proposal to attach a "Term and Condition" pending a review of the operation of the presently licensed dining lounge facilities after January 31, 1985. On the 21st day of March, 1985, the Board apparently took no action with respect to the application for the entertainment lounge licence but attached the said "Term and Condition" which is the subject of this appeal.

The first witness called on behalf of the Board was Steve Holubko, an investigator with the Liquor Licence Board for the past six years. He stated that his duties were to check food/liquor ratios and to determine the method of recording sales and that he made spot-checks on licensed premises throughout the province. The witness testified that he attended at the premises of the J.B.'s Corral Restaurant on October 4, 1984, and his report was filed at page 14 of the Record of Proceedings. The witness stated that he arrived at the premises at approximately 12:40 p.m. and sat at the bar. He stated that there were only a few people in the premises and that no food was being served. He returned at 6:30 that evening and stated that there were very few people eating at that time. He came back to the restaurant on the evening of October 4 at approximately 9:50 p.m. and remained until shortly after midnight. There were many patrons in the premises and entertainment was being offered in the form of country and western bands. Mr. Holubko returned to the premises on the morning of October 5 requesting the books, but was advised that they were not available. He was permitted to review the daily cash sheets and the cash sheets for the month of August, 1984, indicated that food sales represented 7.6 per cent of the total sales while liquor sales represented 92.4 per cent of the total sales. The liquor sales for the month of September, 1984 according to the cash sheets represented 94 per cent of the total sales.

The witness advised that he returned to the premises and monitored total sales for a period of two days on January 31, 1985 and on February 1, 1985. His inspection of the kitchen indicated that there was suitable equipment and adequate food on hand and that cooks were on duty, but that the furnishings in the dining room were not properly set up for dining. He stated that daily specials were advertised and the sales were recorded on one cash register, which register was cleared twice a day. He stated that there were detailed receipt tapes and that records were kept re food purchases on a daily basis. He confirmed that the daily records compared with the reports submitted to the Board, but that the ledgers were still not available to him. The witness advised that he had made a spot-check the day before (January 30, 1985) at which time he had ordered a drink and was charged a night price of \$2.50. The tape for this order showed a liquor purchase of \$1.40 and \$1.10 for mix which was included as a food sale. The witness introduced as evidence the food/liquor ratio reports which were filed for the period from October, 1984 to and including January, 1985, which were as follows:

<u>Month</u>	<u>Liquor Sales</u>	<u>Food Sales</u>
October, 1984	87.5%	12.5%
November, 1984	82.0%	18.0%
December, 1984	76.0%	24.0%
January, 1985	79.0%	21.0%

On cross-examination, the witness confirmed that the record of sales appeared to be accurate and that he had no knowledge that there were not proper sales ledgers for the premises. He confirmed that Mrs. Jean Biasucci, the proprietor of the premises, was present when he attended at the premises in October of 1984. When questioned about the inclusion of mix used in drinks in food sales the witness stated that it often depends on whether the drink is mixed at the bar and that the procedure followed by the Licensee was not unusual. He stated that he had been told that the bookkeeper was instructed in 1984 to prepare a sales ledger but, to his knowledge, this had not been completed. Mr. Holubko stated that in his opinion an 85/15 ratio as required by an entertainment lounge licence could be possible, but that a concerted effort to sell additional food would be required. His conclusion from observing the atmosphere of the dining lounge and the clientele was that the premises and the entertainment offered were not conducive to a dining lounge establishment and stated that in his opinion there should be a separate dining area.

The next witness called on behalf of the Board was Wally Malkiewicz who had been an inspector with the Liquor Licence Board for the last 12 years in the Niagara Peninsula area and was familiar with the premises of the Licensee. He stated that he had made 11 visits to the premises during the past year and that the largest number of people he had seen having dinner in the evening was approximately 15 people. The witness stated that country and western music entertainment was provided and that any advertising promoted the music and not the food. When he attended at the premises on July 2, 1985, he was advised that the cook did not come in until 5:00 p.m. and that sandwiches only were served before that time. On May 11, 1985, he attended at the premises at approximately 10:15 p.m. and there were between 175 and 225 people in attendance with no sign of food being served or consumed. There were three barmaids and six waitresses on duty at that time. He stated that only seven to eight tables had a tablecloth and they were very close to the kitchen door and that in his opinion it would be extremely difficult for the Licensee to maintain the 60/40 liquor/food ratio.

On cross-examination, the witness acknowledged that there were menus on the wall behind the bar and that there were as many as 15 food display menus. He stated that he was aware of a management change and that he always gets his full reports. The witness stated that he very often saw Mrs. Biasucci, the proprietor. He confirmed that there were a minimum of 50 restaurants in the area and that competition for the food business was very tough and that these premises would not attract tourists. The witness provided the following breakdown of sales of liquor and food for three days in June and July of 1985 which indicated the inability of the Licensee to meet the proper ratio, which was as follows:

<u>Date</u>	<u>Liquor</u>	<u>Food</u>
June 29, 1985	\$1,842.00 (83.9%)	\$352.00 (16.1%)
June 30, 1985	\$1,683.00 (86.6%)	\$259.00 (13.4%)
July 1, 1985	\$ 344.00 (82.6%)	\$ 72.00 (17.4%)

These figures were apparently taken off the tape. The witness also confirmed that there were too many pinball machines in the premises, there being seven machines while the regulations permitted a maximum of five machines.

The first witness called on behalf of the Applicant was Jean Biasucci, who was the owner of 476535 Ontario Limited and she confirmed that she had no partners in the business. She stated that she had active participation in the operation of the dining lounge and was there every day. She confirmed a staff of 16 with Mr. Michael Daniels being appointed manager in November of 1984. Prior to that, her ex-husband had been the manager but he had left in 1985.

Under cross-examination, Mrs. Biasucci acknowledged that she had been trying to develop a decent menu but that it was hard to achieve a proper liquor/food ratio because food prices were so low in the area and it was impossible to force persons to eat.

Michael Daniels who was the general manager of J.B.'s Corral Restaurant since November of 1984 was called as a witness and stated that he was responsible for the ordering of supplies, the hiring and firing, the payroll, the supervision of the bar and the restaurant, together with marketing and promotion. He stated that he had injected new food items into the menu in January of 1985 and had changed the entertainment from a country and western type of music

to a soft rock and roll. This resulted in a younger type of clientele frequenting the premises and resulted in a demand for "munchy" types of food. He stated that there were many fast food outlets in the area and that it was very difficult to compete with them. He detailed the various attempts that had been made to improve food sales and confirmed that his staff included three full time cooks. The witness confirmed the difficulty that the establishment was having with the ratio and acknowledged that only so much improvement was possible. He also stated that a dining lounge ratio was unrealistic to achieve and that it would be more appropriate to have an entertainment lounge licence. He gave his opinion that the best possible ratio which probably could be achieved would be a 25 to 30 per cent food sale on a constant basis and that this had been determined from his observations of the business after 12 years of experience in the restaurant industry.

Counsel for the Board, in argument, confirmed that the facilities were good and that adequate food was available and that proper books and records had been kept. He referred to the evidence of the manager, Michael Daniels, who summed up the whole issue in that it was unrealistic to expect that the Licensee could achieve the 60/40 liquor/food ratio. As a result, there was no real effort to change the atmosphere and the facilities were conducive to a quick snack. He referred the Tribunal to the average food sales for the period from August of 1984 to September of 1985 as being less than 20 per cent of total sales. He submitted that the Board had been correct in its imposition of the "Term and Condition" and that there was no reason for a change.

Counsel for the Applicant admitted that the proper ratios had not been met and likely would not be met. He submitted that the condition imposed by the Liquor Licence Board was unduly harsh and that it would have a disastrous economic effect as most sales were after 7:00 p.m. He confirmed that an application had been made for an entertainment lounge licence, but that this had been adjourned pending disposition of the appeal of the decision of the Board imposing the "Term and Condition". He argued that the decision of the Tribunal should be deferred until such time as the application for the entertainment lounge licence had been disposed of.

The Tribunal finds that the Licensee has not met the requirements of Section 9(6) of Regulation 581 of the Liquor Licence Act. It would appear that the licensed establishment is being operated as if the Licensee was the holder of a proper entertainment lounge licence. The Tribunal acknowledges that an application for an entertainment lounge licence has been pending for some time but the Tribunal must look at the facts as they relate to the present licence.

Accordingly, by virtue of the authority vested in it under section 14(3) of the Liquor Licence Act, the Tribunal hereby confirms the decision of the Liquor Licence Board dated the 21st day of March, 1985 and directs the Board to set the date of commencement of the said "Term and Condition". However, the Tribunal recommends that in view of the evidence introduced before the Tribunal, the implementation of the "Term and Condition" be deferred pending a decision by the Liquor Licence Board on the application for the entertainment lounge licence.

GOLD KEY RESTAURANT LIMITED
(LATIN QUARTER II RESTAURANT)

APPEAL FROM A DECISION OF THE
LIQUOR LICENCE BOARD OF ONTARIO

THAT UNLESS CERTAIN REQUIREMENTS WERE SATISFIED
THE ENTERTAINMENT LOUNGE LICENCE WOULD BE SUSPENDED

TRIBUNAL: LACHLAN CATTANACH, Q.C., VICE-CHAIRMAN, PRESIDING
HELEN J. MORNINGSTAR, MEMBER
NEIL VOSBURGH, MEMBER

APPEARANCES:
RICHARD I. KESTEN, representing the Applicant
S.A. GRANNUM, representing the Liquor Licence Board

DATE OF
HEARING: 29 October 1986
Toronto

REASONS FOR DECISION AND ORDER

This is an appeal by the Gold Key Restaurant Limited, Licensee of Latin Quarter II Restaurant situate at 2 Melanie Drive, Unit #10, Brampton, Ontario from the Decision of the Liquor Licence Board of Ontario dated the 20th day of February, 1986, suspending the Entertainment Lounge Licence of the Licensee unless the indebtedness of \$31,308.73 being arrears of fees payable under the said Entertainment Lounge Licence, together with other requirements as set out in the Decision of the Board were satisfied by March 17th, 1986. The Board had originally issued a Notice of Proposal on October 29th, 1985, and as a result of that Notice of Proposal, the Licensee requested a hearing which request was dated November 28th, 1985.

The Liquor Licence Board held a hearing on February 20th, 1986, after a request for one adjournment which had been granted, and the Decision of the Board which was issued on that date is the subject of the appeal to this Tribunal. The Applicant acknowledges that the said balance of \$31,308.73 is due and owing, and advised that the purpose of the appeal to the Tribunal was primarily to obtain an Order granting a time for payment. The Tribunal finds upon the evidence before it that the Licensee is in default of payment of the sum of \$31,308.73 as set out in the Notice of Proposal.

Therefore by virtue of the authority vested in it under Section 14(3) of the Liquor Licence Act, the Tribunal varies the Decision of the Liquor Licence Board dated the 20th day of February, 1986, and directs the Licensee to pay the sum of \$1,000.00 per week on account of the arrears of licence fees of \$31,308.73 plus interest with the first payment to be made on or before Monday, November 3rd, 1986, and payable \$1,000.00 weekly thereafter until the said sum of \$31,308.73 plus interest has been fully paid. In the event the Licensee fails to make weekly payments as provided under this Decision and is in default for more than 3 days, the Tribunal directs the Board to forthwith suspend the said Entertainment Lounge Licence of the Licensee until the total balance of \$31,308.73 plus interest has been paid. In addition, the Licensee shall pay any balance owing for fees for beer purchases for the months of September and October 1985 on or before November 10th, 1986 and the failure to pay any such arrears shall entitle the Board to suspend the said licence forthwith.

EDWARD HINSCHBERGER

APPEAL FROM THE ORDER OF INTERDICTION OF
THE LIQUOR LICENCE BOARD

TRIBUNAL: STEPHANIE J. WYCHOWANEC, Q.C., CHAIRMAN, PRESIDING
DR. STUART E. ROSENBERG, MEMBER
ROBERT COWAN, MEMBER

APPEARANCES:

S.A. GRANNUM, representing the Liquor Licence Board
No one appearing for the Applicant

DATE OF
HEARING: 3 November 1986

Toronto

REASONS FOR DECISION AND ORDER

To the best of this panel's knowledge, this is the first appeal to this Tribunal from an Order of the Liquor Licence Board made under section 34 of the Liquor Licence Act prohibiting the sale of liquor to an individual. It is therefore regrettable that the Applicant, Edward Hirschberger, did not appear on the appointed date to present his case.

Section 34(1) of the Liquor Licence Act reads as follows:

34-(1) Where it is made to appear to the satisfaction of the Board that a person, resident or sojourning in Ontario, by excessive drinking of liquor, mispends, wastes or lessens his estate, or injures his health, or interrupts the peace and happiness of his family, the Board may make an order of interdiction prohibiting the sale of liquor to him until further ordered.

The Record of Proceedings before the Liquor Licence Board which was filed as Exhibit 4 in this hearing, contains a letter dated September 29, 1985, from the common law spouse of Mr. Hirschberger wherein she requests that an interdiction order be made. The letter reads in part as follows:

I find that it is necessary to have Mr. Edward Menschberber (sic) placed on your inter-active list, a [sic] he is a great hazard while driving on the highways. His health is also suffering, mentally and physically, due to his excessive drinking. Also my thirteen year old daughter is under a great deal of mental strain. Her school work is suffering and she is currently having sessions with a guidance counselor...

...He is the owner, and principal driver, of a taxi business here in Deep River. We have been living together for the past five years...

He had been convicted for drunk driving in 1984 and had his driver's license suspended. He didn't learn anything from that experience...

...I find that my strength is starting to fail, I just cannot continue to work and think for two people. We just cannot seem to get the message across to him that he is a danger to other drivers on the highways. He should realize this himself, as he was an officer with the Ontario Provincial Police force.

He received a letter from the mayor of Deep River stating that the taxi license would be revoked if he was caught drunk driving again. This is the only income that we have coming in to keep a roof over our heads, which I find difficult at times, due to the fact that business isn't that busy, mainly because it is common knowledge in this area, that he has a drinking problem and people are afraid to drive with him...

We also drive school children too [sic] and from school by taxi. I am in constant fear that he will drive them when he has been drinking. Frequently he forgets to pick them up after school, due to his drinking, then I have to call in the spare taxi driver to go for them...

The common law spouse did not attend this hearing. The only witness called on behalf of the Liquor Licence Board was one of its Inspectors, Andy Willett. It was his testimony that he had spoken with Mr. Hirschberger about the convictions against him for driving while impaired and that Mr. Hirschberger had offered no excuses for his behaviour. Mr. Willett also testified that he had met with the O.P.P. officers in the area and the Chief of Police in Deep River. The latter had advised him that there had been talk at the beginning of the school term that Mr. Hirschberger had been drinking on days when he was required to pick up children to drive them to and from school, but that now a different driver was doing this. It also appears that Mr. Hirschberger continues to purchase liquor and beer both for himself and others at the local liquor store and Brewers Retail outlet.

Although the Tribunal has some concerns about the constitutionality of Section 34 in light of the Charter of Rights, this issue was not raised and the Tribunal has therefore proceeded on the basis that this section is valid provincial legislation.

The Tribunal accepts the unrefuted evidence, such as it is, that Mr. Hirschberger has a drinking problem and that it is affecting not only the peace and happiness of his family, but his earning capability as well. The Tribunal is of the opinion that the Liquor Licence Board had reasonable grounds upon which to satisfy itself that the Interdiction Order should be issued. Accordingly by virtue of the authority vested in it under Section 14(3) of the Liquor Licence Act, the Tribunal hereby confirms the Order of Interdiction issued by the Liquor Licence Board of Ontario dated the 15th day of April, 1986 wherein the Board ordered that the sale of liquor to Mr. Hirschberger be prohibited until further order by the Board.

The Tribunal notes that under Section 35 of the Liquor Licence Act, a person in respect of whom an Order of Interdiction has been made, may apply to the Liquor Licence Board at any time to show that circumstances of the case do not warrant the making of the Order or one year after the Order has been made if the person has refrained from drunkenness during that period.

JIM WONG'S TAVERN LIMITED
(JIMMY'S PLACE TAVERN)

APPEAL FROM THE DECISION OF THE
LIQUOR LICENCE BOARD OF ONTARIO

TO ATTACH A TERM AND CONDITION TO THE
DINING LOUNGE LICENCE

TRIBUNAL: LACHLAN CATTANACH, Q.C., VICE-CHAIRMAN, PRESIDING
DR. STUART E. ROSENBERG, MEMBER
RONALD CHEMIJ, MEMBER

APPEARANCES:
DAVID B. BLACK, Q.C. representing the Applicant
S.A. GRANNUM, representing the Liquor Licence Board

DATE OF
HEARING: 28 November 1985 Toronto

REASONS FOR DECISION AND ORDER

This is an appeal by the Licensee from the Decision of the Liquor Licence Board of Ontario dated the 28th day of March, 1985, whereby the Board attached a "Term and Condition" to the dining lounge licence of the Licensee in respect of its premises known as "Jimmy's Place Tavern" situate at 951 Lakeshore Road East, Mississauga, Ontario, requiring that the sale and service of alcoholic beverages in the licensed premises shall cease at 11:00 p.m. daily.

The Board originally issued a Notice of Proposal on the 29th day of May, 1984, whereby it proposed pursuant to Section 10(3) of the Liquor Licence Act to revoke the dining lounge and patio dining lounge licences of the Licensee. A hearing was held at the request of the Licensee on the 7th day of August, 1984 and was adjourned until the 28th day of March, 1985 to allow the Licensee an opportunity to conform to the liquor licence ratio and rectify other discrepancies in its operation. After a further hearing on the 28th day of March, 1985, the Board issued its Decision attaching the said "Term and Condition".

The first witness called on behalf of the Board was Jaroslaw Wilk who was an Inspector with the Liquor Licence Board for the past 17 years and had inspected the Licensee's

premises for the past three to four months. He gave evidence and identified exhibits including the menus for the premises. He confirmed that the equipment appeared to be adequate for the operation of a dining lounge and that the restaurant was located close to a small plaza. He stated that most of the patrons were industrial workers from the Lakeshore area. He identified a stage which was used for topless entertainment after 4:30 p.m. from Monday to Saturday, inclusive, each week. He stated that the premises were operated by Mr. and Mrs. Wong and that there were approximately 12 to 15 persons for lunch on the last date that he made an inspection. The witness stated that he had checked the premises on seven or eight occasions and found that the food items were very inexpensive and, in his opinion, made it difficult for the Licensee to meet its liquor/food ratio. The witness stated that most patrons came in for a snack together with a couple of beers and not for meals.

On cross-examination, the witness stated that Mr. and Mrs. Wong appeared to be competent proprietors and that there was a reasonable selection of food, but the problem was that most customers wanted to drink and the Licensee was not able to charge high prices for food in that district because of the competition. There were several other restaurants in the immediate area.

The Applicant called as its only witness James Wong, one of the principals of the Licensee corporation. He stated that he worked on a full time basis with his wife in operating the dining lounge and that he was fully trained to operate the kitchen. He stated that they had their first problems in March of 1984 and since that time had made various changes to the menu together with their program to increase the sale of food. He stated that they had many specials and that he changed the menu every week. He stated that he did no advertising other than in the window of the premises. The witness stated that when patrons came into the premises they were always asked if they wanted a menu and most said, "No". On cross examination the witness acknowledged that entertainment in the form of topless dancers was provided and that if there was no entertainment, there would be no business. He confirmed that entertainment started daily at 4:30 p.m. and that business was very competitive in the area.

Counsel for the Board filed as an exhibit the food/liquor ratios for the period from January of 1984 to September of 1985, inclusive, and the exhibit indicated that the ratio problem began in August of 1984 when liquor sales

were 80 per cent of total sales. The exhibit indicated that the only month that the Licensee came close to achieving the proper ratio was in March of 1985 when food sales were 39.6 per cent of total sales.

Counsel for the Board, in argument, referred to Exhibit 6 which was the food/liquor ratio report for the period from January of 1984 to September of 1985. He pointed out that the hearing before the Board on the original Proposal was adjourned for a period of six months from August of 1984 to March of 1985 in order to permit the Licensee to attempt to comply, but there still had been no compliance with the Regulation and it was apparent that the Licensee could not comply with the Regulation because of the type of operation that the Licensee was conducting. Counsel confirmed that all other problems relating to the Licensee's operation which had resulted in the original Notice of Proposal to revoke had been rectified and that the only continuing problem was the failure to meet the food/liquor ratio.

Counsel for the Applicant argued that it was apparent that the Licensee was doing as much as it possibly could. He submitted that Section 9(6) of Regulation 581 under the Act was arbitrary and unfair. Only the customer can decide whether he wishes to purchase food or liquor or a combination thereof. He stated that the legislation gives the Lieutenant-Governor in Council the power to pass regulations under Section 39 of the Liquor Licence Act, but to pass a regulation which requires a certain ratio is arbitrary and unfair when it is the customer who will choose. Counsel argued that the Regulation is a bad Regulation and should be changed. He acknowledged that it was difficult for the Licensee to increase its food ratio. He submitted that in view of the true meaning of the Regulation the Tribunal should find it to be an incompetent Regulation and refuse to enforce it.

Counsel referred to the Decision of the Liquor Licence Appeal Tribunal in the appeal of The Red Velvet Restaurant reported in Volume 5, page 63, of the Summaries of Decisions where the Tribunal, on the merits of that case, allowed the appeal and revoked the Decision of the Liquor Licence Board imposing a "Term and Condition". He argued that the Licensee was making a bona fide effort and in the circumstances there had been a significant improvement in the ratio.

In reply, counsel for the Board argued that only the Legislature can change the legislation and that Section 9(6) of Regulation 581 is mandatory. He stated that if an

establishment cannot comply with the Regulation, it ought not to have a licence. He pointed out that the Board had been lenient with the Licensee in that the usual "Term and Condition" which is imposed is to prohibit the sale of alcoholic beverages after 10:00 p.m.

After reviewing all of the evidence, the Tribunal is of the opinion that the Decision of the Liquor Licence Board dated March 29, 1985 should be confirmed. It is acknowledged by all parties that the Licensee has not met the proper ratio as required by Section 9(6) of Regulation 581 of the Liquor Licence Act and that such failure to comply has continued to date. The Licensee should have known of the requirements of the Regulation when it applied for the licence and of the continuing responsibility on the Licensee to meet the ratio. It is true that the customer may decide when he comes into licensed premises whether he will purchase food or liquor, but there is evidence before the Tribunal that the type of atmosphere created by the Licensee induces drinking on the part of most customers as opposed to dining. In the Red Velvet Restaurant decision, the Tribunal was of the opinion that there had been sufficient bona fide attempts made to achieve compliance with the Regulation such as the implementation of a breakfast trade but, in this appeal, the attempts of the Licensee to promote the sale of food are negated by the type of entertainment offered.

The Tribunal finds that the Licensee has not met the requirements of Section 9(6) of Regulation 581 of the Liquor Licence Act. Accordingly by virtue of the authority vested in it under Section 14(3) of the Liquor Licence Act, the Tribunal hereby confirms the Decision of the Liquor Licence Board dated the 29th day of March, 1985 and directs the Board to set the date of commencement of the said "Term and Condition". *

*Note: The above decision was appealed to the Supreme Court of Ontario (Divisional Court) by Jim Wong's Tavern Limited (Jimmy's Place Tavern). The appeal had not been concluded at the time of this publication.

RACHELLE and DORIAN LABELLE
(MARKSTAY TAVERN)

APPEAL FROM THE DECISION AND ORDER OF
THE LIQUOR LICENCE BOARD OF ONTARIO

TO SUSPEND THE LIQUOR LICENCE (LOUNGE)

TRIBUNAL: LACHLAN CATTANACH, Q.C., VICE-CHAIRMAN, PRESIDING
KENNETH VAN HAMME, MEMBER
ROBERT COWAN, MEMBER

APPEARANCES:

S. A. CRANNUM, representing the Liquor Licence Board

No one appearing for the Applicants

DATE OF
HEARING: 15 October 1986

Sudbury

REASONS FOR DECISION AND ORDER

This is an appeal by Rachelle and Dorian Labelle, the Licensees of the Markstay Tavern, Markstay, Ontario, from the decision of the Liquor Licence Board dated the 7th day of January, 1986 whereby it suspended the liquor licence of the Licensees for a period of fourteen days.

The Board had originally issued a Notice of Proposal on the 25th day of April, 1985 whereby, because of the past conduct of the licence holders, there were reasonable grounds for belief that the business of the Licensees would not be carried on in accordance with law in that, contrary to Section 43 of the Liquor Licence Act, the licence holders permitted liquor to be supplied to persons in an apparently intoxicated condition. Secondly, contrary to Section 8(4) of Regulation 581 of the Act, the licence holders permitted drunkenness and disorderly conduct to take place on the licensed premises. The Licensees requested a hearing before the Board. This hearing was held on the 7th day of January, 1986 and the decision rendered.

On hearing the evidence which has been submitted this morning, the evidence of Constable Fitzgerald of the Ontario Provincial Police, the Tribunal is of the opinion that there has been a lack of management and control on the

part of the Licensees in that they have served intoxicated persons and have permitted drunkenness and disorderly conduct on the premises.

The Tribunal finds that there are reasonable grounds for belief that the business of the Licensees, the operation of the Markstay Tavern, would not be carried on in accordance with law as set out in the Notice of Proposal.

Therefore by virtue of the authority vested in it under section 14(3) of the Liquor Licence Act, the Tribunal hereby confirms the decision of the Liquor Licence Board dated the 7th day of January, 1986 whereby it suspended the liquor licence of the Licensees for a period of fourteen days and the Tribunal directs the Board to set the date of commencement of the suspension.

GORDON JOHN MECKE
(PARIS TAVERN)

APPEAL FROM THE DECISION OF THE
LIQUOR LICENCE BOARD OF ONTARIO

TO SUSPEND THE LOUNGE LICENCE

TRIBUNAL: LACHLAN CATTANACH, Q.C., VICE-CHAIRMAN, PRESIDING
DR. STUART E. ROSENBERG, MEMBER
RONALD W. CHEMIJ, MEMBER

APPEARANCES:

GORDON JOHN MECKE, appearing on his own behalf

S.A. GRANNUM, representing the Liquor Licence Board

DATE OF

HEARING: 23 June 1986

Toronto

REASONS FOR DECISION AND ORDER

This is an appeal by Gordon John Mecke, the Licensee of Paris Tavern, from the Decision of the Liquor Licence Board of Ontario dated the 24th day of October, 1985, whereby the Board suspended the lounge licence of the Licensee for a period of four days.

The Board originally issued a Notice of Proposal on the 18th day of July, 1985, whereby it proposed to suspend both the dining lounge and lounge licences of the Licensee for a period of 14 days. The Licensee requested a hearing before the Board and this hearing was held on the 24th day of October, 1985, at which time the Board rendered its Decision suspending the lounge licence for the four day period.

There were three incidents referred to in the Notice of Proposal.

The first, an incident on the 5th day of May, 1985, whereby charges were laid with respect to the contravention of Section 9(22) of the Regulation, in that "all evidence of the service and consumption of liquor was not removed from the licensed premises within 45 minutes after the sale and service of liquor in the licensed premises ought to have ceased". These charges were subsequently withdrawn.

There were also charges laid with respect to an incident which occurred on the morning of June 15th, 1985, whereby contrary to Section 9(23) of the Regulation, the licensed premises "were not cleared of patrons within 45 minutes after the sale and service of liquor ought to have ceased". The Licensee was charged and convicted of this offence in Provincial Court and paid a fine of \$300.00.

There is a third incident which occurred on the evening of June 15th, 1985, whereby the licence holder was alleged to have permitted a person apparently under the age of nineteen years to be on the premises licensed as a lounge. The individual was convicted but there was no conviction against the Licensee with respect to this incident.

The Applicant has stated in this hearing this morning that only the incident of June 15th is relevant since the other charges were withdrawn against the Applicant, although the Applicant acknowledges the facts with respect to the two other incidents.

The Tribunal notes that the Board in its Decision of October 24th, 1985, substantially reduced the penalty in that the original penalty was a suspension of both the lounge and dining lounge licences for a period of fourteen days.

The Tribunal finds on the evidence before it this morning that the Licensee did in fact carry on activities contrary to the Act and the regulations thereunder as set out in the Notice of Proposal. The Tribunal feels that the Board in its Decision of October 24th, 1985, has taken into account the circumstances surrounding all of the events.

Accordingly by virtue of the authority vested in it under Section 14(3) of the Liquor Licence Act, the Tribunal hereby confirms the Decision of the Liquor Licence Board dated October 24th, 1985, and directs the Board to set the date of commencement of the said suspension subject to the provision that the suspension shall commence on a Monday.

CHARLES BERTRAND PECK
(CHARLIE'S ROADHOUSE RESTAURANT)

APPEAL FROM THE DECISION AND ORDER OF THE
LIQUOR LICENCE BOARD OF ONTARIO

TO ATTACH A TERM AND CONDITION TO THE
DINING LOUNGE LICENCE

TRIBUNAL: LACHLAN CATTANACH, Q.C., VICE-CHAIRMAN, PRESIDING
BARBARA J. NICHOLS, MEMBER
NEIL E. VOSBURGH, MEMBER

APPEARANCES:

HOWARD S. BUCKMAN, representing the Applicant

S. A. GRANNUM, representing the Liquor Licence Board

DATE OF

HEARING: 13 May 1986

Toronto

REASONS FOR DECISION AND ORDER

This is an appeal by Charles Bertrand Peck, the Licensee of Charlie's Roadhouse Restaurant, situate at 94 Dunkirk Street, St. Catharines, Ontario, from the Decision of the Liquor Licence Board of Ontario dated the 12th day of July, 1985, whereby the Board attached a term and condition to the Dining Lounge Licence of the Licensee that the sale and service of alcoholic beverages in the licensed premises shall cease at 10:00 p.m. daily until otherwise ordered by the Board.

The Board originally issued a Notice of Proposal on the 28th day of January, 1985, whereby it proposed to attach the said term and condition and the Licensee requested a hearing before the Board. This hearing was held on the 7th day of March, 1985, and the Board subsequently rendered its Decision on July 12, 1985, attaching the said term and condition.

Counsel for the Board filed as an exhibit a summary of the food/liquor ratio reports for the period from and including January of 1984 to and including December of 1985, which reports showed the total liquor sales to be a minimum of 69.8 per cent of total sales and a maximum of 91.9 per cent of total sales. The reports indicated that the best

month for food sales in the whole of 1985 was the month of May where the total food sales amounted to 20.5 per cent of total sales.

Counsel for the Board called as a witness Craig Mehlenbacher, who was an Inspector with the Liquor Licence Board and whose territory included Charlie's Roadhouse Restaurant in St. Catharines. The witness gave evidence as to his observations of the restaurant and confirmed that at the time of his various attendances at the premises, food sales were practically non-existent. He stated that the majority of the business was in the evening when the restaurant offered country music entertainment although, on cross-examination, he confirmed that he had never attended at the restaurant after 5:00 p.m. He stated that the kitchen facilities were adequate and that the food was good and that, in his opinion, the owner was attempting to improve the ratio.

The only witness called on behalf of the Applicant was the proprietor, Charles Bertrand Peck, who had owned the premises since September of 1982. He confirmed that he was the sole owner and proprietor and had taken over the business from The Federal Business Development Bank in return for payment of back rent of \$1,600.00. Mr. Peck testified that he had invested capital for equipment and furnishings to a total of \$127,000.00 and presently had eight full and part-time employees. He stated that he was in charge of the premises and that he had a full-time manager, but that he was present every day and night that the restaurant was open. The witness stated that he had never been able to meet the food/liquor ratio as required by the Regulation under the Liquor Licence Act since the time he had begun operating the restaurant and confirmed that the figures as set out in Exhibit 6 and filed on behalf of the Board were correct. He stated that there was virtually no business until after 8:00 p.m. each evening and that the really busy time commenced between 10:30 p.m. and 11:00 p.m. and continued until closing time at 1:00 a.m.

The witness gave evidence as to the various attempts to improve food sales including the giving of coupons, advertisements in the St. Catharines paper, placemat menus and changes in the type of food to more finger foods. The witness stated that the food/liquor ratio reports for January, February and March had just been filed in early May of 1986 and they indicated an increase of between four and five per cent in the ratio of food sales. The witness stated that if he was forced to suspend the sale of liquor at 10:00 p.m., he would be put out of business as he could not afford to have a live band for a period of one hour only.

On cross-examination, the witness acknowledged that he knew of the ratio and that he had been warned by the Board as early as 1984 when a Notice of Proposal was originally issued.

At the original hearing before the Liquor Licence Board in March of 1985, the matter had been adjourned until July in order to allow him to attempt to meet his ratio.

Counsel for the Board argued that the Licensee had acknowledged the correctness of the food/liquor ratio reports which had been filed before the Tribunal and that he was unable to meet his proper ratio. Counsel pointed out that Section 9(6) of Ontario Regulation 581 of the Liquor Licence Act is mandatory and that the Board had had no alternative or reason not to enforce the regulation.

Counsel for the Applicant reviewed the continued efforts by the Applicant to improve his ratio, and stated there had been a misguided calculation of his ability to meet the ratio. He stated that there was a possibility of an arms-length sale in the near future and that the Licensee should be granted a period of time to make an increased effort to achieve a proper food/liquor ratio.

The Tribunal is satisfied that the Licensee has made an honest attempt to increase his food sales, but the Tribunal is bound by the provisions of the Liquor Licence Act and its Regulation and in view of the evidence before it, which has been admitted by the Licensee, the Tribunal finds that the Licensee has failed to meet the food/liquor ratio requirements of Section 9(6) of Regulation 581 of the Liquor Licence Act and is a long way from meeting the proper ratio. There is a procedure whereby the Licensee can apply for the removal of the term and condition if he is able to achieve a proper food/liquor ratio.

Accordingly, by virtue of the authority vested in it under Section 14(3) of the Liquor Licence Act, the Tribunal hereby confirms the Decision of the Liquor Licence Board dated the 12th day of July, 1985 and directs the Board to set the date of the commencement of the said "Term and Condition".

BURNS H. PROUDFOOT

APPEAL FROM THE DECISION OF THE LIQUOR LICENCE BOARD

to amend the Terms and Conditions by extending the
hours of service from 10:00 to 11:30 p.m.;
to permit live entertainment in the form of
unamplified instruments;
the local community to be advised of any request for
renewal of licence or request for transfer of licence.

RE:

PICCOLO CASTELLO TRATTORIA LTD.
(PICCOLO CASTELLO TRATTORIA RESTAURANT)

TRIBUNAL: MARY G. CRITELLI, VICE-CHAIRMAN, PRESIDING
HELEN J. MORNINGSTAR, MEMBER
DENNIS J. EGAN, MEMBER

APPEARANCES:

BURNS H. PROUDFOOT, appearing on his own behalf and
representing the Nottawaga Creek Ratepayers Association
Applicant

E.P. FIKSEL, representing the
Piccolo Castello Trattoria Restaurant

S.A. GRANNUM, representing the Liquor Licence Board

GLENN SWANICK, representing the
Wahnekeewening Beach Association

PAUL BUTTERS, representing the
North Nottawaga Beach Cottage Owners Association

KATHRYN SPEERS, representing the
Tiny Township Ratepayers Association

DATE OF

HEARING: 4 September 1986

Midland

REASONS FOR DECISION AND ORDER

This was a hearing before the Tribunal held pursuant
to Section 14 of the Liquor Licence Act. The hearing was
required by Mr. Burns Proudfoot who is aggrieved by the
Decision of the Liquor Licence Board dated April 17th, 1986,
made after a hearing held pursuant to Section 12(3) of the

Act. That hearing was held to consider whether certain terms and conditions attached to the Dining Lounge Licence of Piccolo Castello Trattoria Ltd. in respect of Piccolo Castello Trattoria Restaurant ought to be removed.

The Licensee applied for the removal of "terms and conditions" which in effect required the sale and service of liquor in the restaurant to stop at 10:00 p.m. daily and which prohibited live entertainment in the restaurant. The Board's Decision in effect removed these terms and conditions and replaced them with terms and conditions which in effect required the sale and service of liquor in the restaurant to stop at 11:30 p.m. and which permitted unamplified live entertainment in the restaurant.

The authority to remove terms and conditions attached to a licence is found in Section 9(2) of the Liquor Licence Act which provides:

(2) The Board may, on the application of the holder of a licence or permit, remove any term or condition to which the licence or permit is made subject under subsection (1) where there is a change of circumstances.

The first issue, accordingly, that the Board had to consider and that this Tribunal must consider is whether there has been a "change of circumstances" within the meaning of the statutory provision. Unless there has been such a change, the terms and conditions cannot be removed.

It was submitted to this Tribunal that, in order for there to be a "change of circumstances", there must be a change in the character of the surrounding neighbourhood. In this instance, the character of the neighbourhood was and remains essentially that of a residential cottage area. The Tribunal does not accept the submission that the meaning of the term "change of circumstances" is so restricted. The Tribunal is of the view that any change in circumstances relevant to the terms and conditions attached to the licence may be considered.

The Board found as a fact that there had been a change in circumstances as the Licensee had enclosed the former licensed patio and surrendered the patio licence. The Tribunal also heard evidence relating to this structural change and takes the view that the change would reduce the likelihood of noise and people spill-over into the surrounding neighbourhood.

It is, accordingly, a relevant change which brings the Licensee's application for removal of the terms and conditions within the purview of Section 9(2).

Having made this determination, the issue the Tribunal must decide is whether it was appropriate in this case for the Board to remove the terms and conditions originally attached to the licence and replace them with the terms and conditions referred to above.

The Tribunal heard the evidence of Mrs. Strobel who has a cottage directly across from the restaurant. Mrs. Strobel complained of noise, increased traffic and unauthorized parking. Under cross-examination of this witness, the fact was revealed that there is a public beach approximately 500 feet from the restaurant. There was no clear cut evidence linking the complaints of this witness to the restaurant alone and the Tribunal finds as a fact that at least part of the noise, traffic and unauthorized parking results from the use of the public beach.

Mr. Paul Butters gave evidence on behalf of the North Nottawaga Beach Cottage Owners Association. The members of that Association are the owners of ten cottages along the beach road. The closest cottage to the restaurant would be a distance of approximately 400 to 500 feet from the restaurant. The Association opposes the extension of hours to 11:30 p.m., but does not oppose unamplified live entertainment in the restaurant. Some members of the Association are patrons of the restaurant and the Association admits that the restaurant is well managed. Mr. Butters described it as an "enhancement" to the area. Mr. Butters testified that the 10:00 p.m. closing was suitable for a residential neighbourhood. The Association wants to preserve the present nature of the neighbourhood. The Association did advise the Tribunal in its submission that it would accept an 11:00 p.m. closing as a compromise.

The Tribunal recognizes the legitimate concerns of the members of the Association. However, on the evidence before it, the Tribunal cannot find any factual basis for their apprehension that an extension of hours from 10:00 p.m. to 11:30 p.m. will change the character of the neighbourhood.

The witness Glenn Swanick testified on behalf of the Wahnekewening Beach Association which has 100 members. The Association does not oppose the extension of hours or the permission for unamplified live entertainment. The witness expressed his Association's desire to see that noise is kept

inside the restaurant and that music cannot be heard from the street. He stated that noise was not a major problem at present except, perhaps, to persons right next to it.

Mr. Proudfoot, who required the hearing to be held, did not testify at the hearing before the Tribunal.

In support of the Decision of the Liquor Licence Board, the Tribunal heard the evidence of Mrs. Pingitore, one of the co-owners of the licensed premises. She testified that the restaurant is a family-run operation. She testified that no liquor is permitted to be taken out of the restaurant and intoxicated persons are refused service. Since the restaurant opened in June 1984, she has only had to call in the police on one occasion; this being as the result of the refusal of service to an intoxicated person. Many of her customers have complained about the 10:00 p.m. closing time. On week-ends, the majority of her customers arrive after 9:00 p.m. Since June of 1986, the restaurant has been operating until 11:30 p.m. and no complaints about noise or disturbances have been received by the restaurant owner.

The Tribunal next heard the evidence of Mrs. Katherine Speers who is a full time resident of the area and who lives directly across the street from the restaurant at the southeast corner of the intersection, together with her husband and two sons aged 10 and 5. Mrs. Speers testified on behalf of the Tiny Township Ratepayers Association which supports the extension of the hours for service of liquor to 11:30 p.m. Mrs. Speers stated that she was ecstatic when the restaurant was built as the previous structure had been a run down eyesore. She testified that she had not noticed any appreciable difference in noise since the restaurant opened. The restaurant operation has never disturbed her or her family. She testified that there is more noise in the neighbourhood in the summer largely due to summer cottage traffic. Mrs. Speers testified that it was a "treat" for full time residents to have a convenient family restaurant nearby, particularly in the winter months. Since June of 1986, when the hours of operation were extended, she had not noticed any increase in noise.

The final witness called was Mr. Henry Robinson, an Inspector for the Liquor Licence Board. He described the restaurant as a very good operation with no problems whatsoever. He testified that the restaurant was a family oriented gathering place.

Also before the Tribunal were a number of letters that had been put before the Liquor Licence Board at its hearing on April 8th, 1986, and which are referred to in the Decision of the Board. In addition, the Tribunal had before it a letter dated August 31st, 1986, from the Nottawaga Creek Ratepayers Association stating the opposition of the majority of its members to the Decision of the Liquor Licence Board. The letter expressed concerns about noise, traffic, parking and impaired drivers.

After carefully weighing all of the evidence before it, the Tribunal has determined that the Decision of the Liquor Licence Board ought to be confirmed.

The Licensee runs a well-managed establishment that, on a consideration of all the evidence, cannot be found to have created any disturbance to the neighbourhood to date. The Tribunal is not persuaded that the extended hours will cause a change in the character of the neighbourhood.

The Tribunal also notes that the Board ordered as part of its Decision that before the licence is renewed in 1988, notice of the renewal must be sent to all of the objectors at the hearing before the Board so that they may have the opportunity to object to the renewal if they so desire. Furthermore the Board ordered that notice of any application for the transfer of the licence be given to all persons who had notice of the hearing before the Board.

Accordingly by virtue of the authority vested in it under Section 14(3) of the Liquor Licence Act, the Tribunal hereby confirms the Decision of the Liquor Licence Board dated the 17th day of April, 1986.

NUNO SANTOS
(HELEN'S GARDEN RESTAURANT)

APPEAL FROM THE DECISION OF THE
LIQUOR LICENCE BOARD OF ONTARIO
TO SUSPEND THE DINING LOUNGE LICENCE

TRIBUNAL: LACHLAN CATTANACH, Q.C., VICE-CHAIRMAN, PRESIDING
KENNETH VAN HAMME, MEMBER
DENNIS J. EGAN, MEMBER

APPEARANCES:
ALAN A. GLASS, representing the Applicant
S.A. GRANNUM, representing the Liquor Licence Board

DATE OF
HEARING: 6 February 1986 Toronto

REASONS FOR DECISION AND ORDER

This is an appeal by the Licensee from the Decision of the Liquor Licence Board of Ontario dated the 20th day of June, 1985, whereby the Board ordered the suspension of the dining lounge licence of the Licensee in respect of its premises known as "Helen's Garden Restaurant" situate at 1180 Queen Street West, Toronto, Ontario, for a period of seven days.

The Board originally issued a Notice of Proposal on the 29th day of April, 1985, whereby it proposed pursuant to Section 10(3) of the Liquor Licence Act to suspend the dining lounge licence of the Licensee for a period of 14 days. A hearing was held at the request of the Licensee and as a result of the said hearing, the Board issued its Decision suspending the said licence for a period of seven days.

The only witness called on behalf of the Liquor Licence Board was Douglas Grady, a Sergeant with the Metropolitan Toronto Police Department. He stated that he had entered the premises in plain clothes at 11:15 p.m. on the evening of February 15, 1985 and took a seat at the service counter. There were approximately 20 patrons in the restaurant at the time and he testified that the bartender was Maria Santos, the wife of the Licensee, and the waiter was Mateus Rocha. The witness stated that he observed a customer sitting on a stool to the right of him who appeared to be extremely intoxicated. The customer's head was bobbing and his speech was slurred. He ordered a beer while at the

bar and was served while obviously intoxicated in the opinion of the witness. The patron finally left the bar and had to be assisted to the door by another patron.

Sergeant Grady testified that shortly after midnight a patron, who he later identified as Raposo Medeiros, approached the bar and ordered a beer and a shot of liquor. He was carrying on a conversation in a very loud voice and was unsteady on his feet. The witness stated that Medeiros bumped into several patrons as he approached the bar. He was served the shot of liquor by Maria Santos and immediately turned after raising his glass and drank the liquor. The beer was served to him by the waiter Rocha. The witness stated that in his opinion Medeiros was obviously intoxicated.

Sergeant Grady observed three other patrons in the premises at that time. One, Terrence Dunn, was sitting at a table with two women patrons and was served, while in a very intoxicated condition, by the waiter, Rocha. There were also two other persons with Medeiros; one, Gaetano Battisti, and the other, Joe Romano. Battisti was having an argument at the table where he was sitting with a person attempting to sell him a watch and there was a lot of loud haggling. He had two bottles of beer on his table and he ordered and was served another bottle of beer by Maria Santos. When he stood up during the course of his negotiations over the watch, the witness stated that he was very unsteady on his feet and appeared to be very intoxicated. The other patron was Joe Romano who was served two bottles of beer and one shot of liquor during the period he was observed by Sergeant Grady. He was very vocal and when he went to the washroom he needed both hands to steady himself by holding onto the chairs and the walls of the corridor. The witness stated that when Romano returned from the washroom he was in a very dishevelled condition.

At 12:30 a.m. on the morning of February 16, 1985, approximately one hour after Sergeant Grady arrived at the restaurant, three other police officers entered the premises and after consultation with Sergeant Grady various charges were laid. Both Maria Santos, the bartender, and Mateus Rocha, the waiter, were served with summonses and were charged with serving persons in an apparently intoxicated condition. Neither of these charges have been dealt with by the Court.

Sergeant Grady advised that he was present and in Court when Gaetano Battisti was convicted of being intoxicated in a public place and fined \$50.00. Raposo Medeiros was similarly convicted and fined \$25.00 and Joe

Romano was given a conditional discharge. The similar charges against Terrence Dunn were withdrawn after evidence was given that he had just come in from working a long shift.

Sergeant Grady also testified of an incident which occurred on the evening of January 13, 1986 in the premises as reported by Constable Redquest of the Metropolitan Toronto Police Department. Constable Redquest entered the premises on the evening of January 13 at approximately 9:05 p.m. where he noted one, Derrick Goulding who appeared to be under the age of 19 years. He had no identification. It was determined that he was 18 years of age, having been born on October 7, 1966. He was charged with drinking while under age, but the charge was withdrawn because of the co-operation he gave to the Police Department with respect to more serious charges that were laid in another matter. Constable Redquest warned Maria Santos, who appeared to be in charge at the time, regarding the apparent appearance and presence of an underage drinker, but no charges were laid against her.

Under cross-examination, the witness expanded on his evidence with respect to the elderly patron who was sitting at the bar and testified that the patron had little control over his head movements and in his opinion was very intoxicated. He acknowledged that his condition was similar to that of Terrence Dunn, but stated that he was subsequently satisfied that Dunn was suffering from fatigue after a long day's work. The witness agreed that the strong odour of alcohol, alone, was not evidence of intoxication. He stated that he saw the elderly patron, whom he referred to as a "grizzled veteran", walk to the washroom and that he had to put his hands on the walls of the corridor in order to reach the washroom. When he left the premises, he was able to walk to the wall, a distance of about five to six steps, and he was assisted from the premises by another patron.

The witness stated that Raposo Medeiros walked to and from the bar on his own and required no assistance but, in the opinion of the officer, he had to lean against the bar to steady himself. The conduct of Medeiros was one observation of the witness that led to his belief that Medeiros was intoxicated. He stated that Medeiros was making several suggestive comments to female patrons in the bar, but he had no record of these comments in his notes. He stated that Medeiros was the party who assisted the older patron when he left the premises.

Under cross-examination, the witness stated that Gaetano Battisti was shouting in a very loud voice when standing at the table in discussions over the purchase of the

watch and that he used the table to steady himself. He stated that the arrests were made by the other officers on their own after making their own observations and after discussion with Sergeant Grady.

With respect to the underage patron, Derrick Goulding, the police officer had been advised by Maria Santos that Goulding had previously been in the premises and had produced false identification consisting of some other person's drivers licence and that was why she had not asked him for any identification on this occasion.

Counsel for the Licensee advised that he would not be calling any witnesses, but he provided the Tribunal with some information as to the background of the Licensee. Nuno Santos was of Portuguese descent and had been in Canada for approximately 15 years. He was married with three children and was the owner of one other licensed dining lounge known as "The Old York Restaurant" on Niagara Street in Toronto. He had owned these premises for approximately five years. He had never had any problem with that licence and his instructions to his staff were not to serve minors or intoxicated persons. He stated that the strict instructions to all staff were to require proper identification.

In argument, counsel for the Liquor Licence Board referred to section 43 of the Liquor Licence Act which stated "no person shall sell or supply liquor or permit liquor to be sold or supplied to any person in or apparently in an intoxicated condition". He argued that there was sufficient evidence of apparent intoxication and referred to the two certificates of conviction filed with respect to Battisti and Medeiros and the certificate with respect to the conditional discharge given to Romano. Counsel pointed out that the manner of determining the age of the underage patron, Goulding, indicated a laxity on the part of the Licensee and they must have been suspicious since they had previously asked for identification. Goulding was also apparently underage since he had been asked for identification by the police officer. It was pointed out that the licensed premises were very small with a maximum capacity of 28 persons, and yet, approximately 20 per cent of the customers were intoxicated on the evening of February 15, 1985, and on the early morning of February 16, 1985. He stated that the regulations under the Liquor Licence Act should be relatively easy to enforce in such small premises. He pointed out that the penalty had been reduced from the original Notice of Proposal wherein it was proposed to suspend the liquor licence of the Licensee for a period of 14 days.

Counsel for the Applicant argued that the word "intoxication" was a very general term and that a person could be intoxicated for one purpose while not for another purpose. He stated that the effect of alcohol on the behaviour of an individual does not always indicate intoxication. Some people might speak more loudly after consuming alcohol, but are not necessarily intoxicated. Counsel suggested that the penalty of suspension was harsh and excessive. He stated that the Licensee and his wife were making an honest attempt to run a business in not the most savoury area of Toronto, and that there was nothing to indicate that the other patrons were offended, but that people were merely having a good time. He stated that the incidents occurred at very late hours and there was the possibility of fatigue similar to the fatigue suffered by Terrence Dunn who had the charges against him withdrawn. There were no previous warnings to the Licensee and no evidence that it had previously happened. He confirmed that Mrs. Santos had taken the training seminar given by the Liquor Licence Board. He stated that Mr. Santos was mainly involved in driving a taxicab and that Mrs. Santos was usually in charge of the premises. Counsel argued that a proper definition of "intoxication" would be that of a person beyond self-control and that there was not sufficient evidence to indicate that this was the case.

After reviewing the evidence, the Tribunal finds that the Licensee did sell or supply liquor or permit liquor to be sold or supplied to several persons in or apparently in an intoxicated condition and that the Licensee is in breach of a "term and condition" of his liquor licence. The Tribunal also finds that the Licensee did serve a patron apparently under the age of 19 years with liquor and that as a result the Licensee was also in breach of a "term and condition" of his liquor licence contrary to section 44 of the Liquor Licence Act. The Licensee and his wife should be fully experienced in the operation of their premises since the Licensee has owned and operated the "The Old York Restaurant" with its licensed premises for approximately five years. The Tribunal is of the opinion that the Licensee was lax in the enforcement of the Liquor Licence Act and its Regulation and would point out that the Board had been lenient in reducing the period of suspension from 14 days to seven days. The Tribunal can see no reason why it should interfere with the Decision of the Board.

Accordingly by virtue of the authority vested in it under Section 14(3) of the Liquor Licence Act, the Tribunal hereby confirms the Decision of the Liquor Licence Board dated June 20th, 1985, and directs the Board to set the date of commencement of the said suspension.

SCARBOROUGH BRIDGE STUDIO
(SCARBOROUGH BRIDGE & SOCIAL CLUB)

APPEAL FROM THE DECISION OF THE
LIQUOR LICENCE BOARD OF ONTARIO

TO REVOKE THE LICENCE

TRIBUNAL: LACHLAN CATTANACH, Q.C., VICE-CHAIRMAN, PRESIDING
DR. STUART E. ROSENBERG, MEMBER
NEIL VOSBURGH, MEMBER

APPEARANCES:

PETER KRAWEC, representing the Applicant

S.A. GRANNUM, representing the Liquor Licence Board

DATES OF

HEARING: 10 April and 11 June 1986

Toronto

REASONS FOR DECISION AND ORDER

This is an appeal by Scarborough Bridge Studio from the Decision of the Liquor Licence Board of Ontario dated the 19th day of November, 1985, whereby the Board revoked the club licence of Scarborough Bridge Studio for the premises known as the "Scarborough Bridge & Social Club" at 515 Milner Avenue, Unit #4, Scarborough, Ontario, effective December 4, 1985.

The Applicant is the Licensee of the premises known as the "Scarborough Bridge & Social Club" and the Liquor Licence Board issued a Notice of Proposal on the 8th day of July, 1985 to revoke the said licence pursuant to Section 10(3) of the Liquor Licence Act because, according to the Proposal, the Licensee is carrying on activities that are contrary to Section 1, clause (d) of Regulation 581 of the Liquor Licence Act in that the licence holder is not a 'club' as defined therein and that the Manager in charge of the premises was convicted of permitting liquor to be removed from the licensed premises contrary to Section 9(13) of the said regulation.

The Applicant requested a formal hearing before the Board pursuant to Section 11(3) of the Liquor Licence Act and a hearing was held on the 19th day of November, 1985. The Board, by its Decision dated the 19th day of November, 1985, revoked the said club licence and the Licensee appealed their Decision to this Tribunal.

The first witness called on behalf of the Board was Irene de Berner who was an Investigator with the Liquor Licence Board. She stated that she had investigated the Scarborough Bridge & Social Club on the 9th day of May, 1985 and her report was filed as part of the record of proceedings before the Liquor Licence Board, which report was dated the 14th day of May, 1985. The witness advised that the signs associated with the premises indicated that it was called the "Milner Club". The witness stated that she entered the premises and approached the bar and ordered a scotch. She was asked to sign a membership book which she did selecting the "guest" column of two columns. She returned to the bar and was served a scotch whisky and paid the sum of \$2.00. The witness then identified herself to the bartender as an Investigator with the Liquor Licence Board and asked to meet the President, Graham Hamilton. She was originally advised that there was no such person, but it appears that he was known as "Bunny" Hamilton. The witness then met with three people who were identified as Robert Fraser, a member, one of the landlords and the Manager of the Club, George Johnston, a member and the bookkeeper, and Donald McConvey, a member and one of the landlords. An examination of the books indicated that there had been no entries since 1982 when five directors resigned and no copies of directors' or members' meetings or by-law revisions since that date. The witness stated that the ease with which she had been able to purchase liquor indicated that the general public could come into the premises and obtain alcohol without any problem.

The witness returned to the premises on May 20, 1985 and at that time met with Mr. Fraser and the President, Mr. Hamilton. It appears that the Club is no longer used for bridge but is used as a sports club and that the condominium unit in which the Club is located is purportedly owned by Fravey Holdings Inc., which is a Company of Mr. Fraser and Mr. R. Provan. The witness confirmed that there was no lease of the premises between the owners of the premises and the Licensee and that Mr. Fraser, as Manager, did not have any written employment contract. The financial records dated back to 1984 only and consisted primarily of two sets of bank statements. A bank account in the name of "Scarborough Bridge & Social Club" was established in the Bank of Montreal and the only signing officers were Mr. Fraser and Mr. Provan, the two landlords, who were not members of the executive of the Club. A further examination of the Club records indicated that various cheques including cheques for public

utilities, mortgage payments and payments to apparent members of the family of Mr. Fraser were all written on the Club account with cheques signed by either Mr. Fraser and Mr. Provan, or by Mr. Fraser alone. The witness was not provided with evidence of any Minutes of meetings of the members of the club approving the financial statements or authorizing the various payments. The President, Mr. Hamilton, indicated that he was not involved in the operation of the Club and that he had turned over the operations of the Club to Fravey Holdings Inc. and Mr. Fraser because they were, to quote him, "there all the time". In the opinion of the witness, the premises were not being operated as a bona fide club and the landlords were operating the said premises as their own business which was open to the public.

The next witness called on behalf of the Board was James Wilson, an Inspector with the Liquor Licence Board, who was responsible for the inspection of the Club for the past three years. He stated that the Club was not a busy place and that he only dealt with Bob Fraser. He never met any of the directors or officers. He stated that he was advised by the Metropolitan Toronto Police that three charges had been laid against Robert Fraser on April 24, 1986, dealing with the serving of liquor after hours, a failure to clear the tables of evidence of liquor and one other charge, and these charges are now pending. He advised that Mr. Fraser is no longer the Manager of the Club. On cross-examination, he stated that he had no knowledge of the police charges or any evidence with respect to same and that he had no knowledge of any reported problems with the Club.

The first witness called by the Applicant was Mr. Robert Fraser, the former Manager of the Club, who stated that he had become associated with the Club in 1980, and that he had purchased the building in 1982. He became involved as Manager of the Club in 1984 and had received no advice as to how to operate the Club. He stated that he only knew Graham Hamilton, the President, as "Bunny" Hamilton, and that he and Mr. Provan were the owners of the building. Counsel for the Applicant introduced as exhibits in this hearing, Exhibit 8, which was a membership list and was apparently prepared approximately one year ago, and Exhibit 9, which was a cash journal containing a statement of income and expenses for the 12 month period ended March 31, 1986. Mr. Fraser stated that all expenses including mortgage payments, payments of taxes, utilities and salaries were all paid through the Club and that he had carried on in the same manner as Mr. Provan had previously. He stated that the Club made donations from

time to time and supported five soccer teams and that if the Club lost its licence, the teams would suffer financially. He stated that with respect to the charges of April 24, 1986, that there had been an international soccer game on television and that after the closing, four of the members had remained to clean up the premises and that he had given them each a beer. There were no other members present. The witness also identified additional draft documents which had been prepared by his counsel, including a draft certificate of encumbrance, a draft application for incorporation of the "Milner Club" as a non-share capital corporation, a draft lease for the premises and draft supporting affidavits, none of which documents were executed.

On cross-examination, the witness confirmed that the membership list had been prepared by Mr. Johnston, the new President of the Club, approximately one year ago and he also confirmed that he had no Minutes of members' meetings. He stated that the financial statements referred to the "Milner Club" and that during his involvement, the property had not been known as the "Scarborough Bridge & Social Club". He advised that the Club had no letterhead. He stated that in January, he had made a request to the Liquor Licence Board to change the name of the club from the "Scarborough Bridge & Social Club" to the "Milner Club" which was done by a simple letter with a cheque for \$50.00 attached. This cheque, together with another cheque issued for the same purpose, had both been returned. The witness confirmed that there had been no meetings of the members approving the payments of the various expenses and cheques and that the regular members merely drop in for a beer, and that they would have an informal meeting. When questioned by the Tribunal about the statement of income and expenses for the 12 month period ended March 31, 1986, the witness confirmed income of \$302,667.00 during that period with total costs of sales, including wages of \$49,249.00, administration expenses of \$20,818.00 and this left, as described in the statement, net profit and cash to bank of \$154,729.00. He stated that during this period, the total donations to soccer clubs would be approximately \$2,300.00, although the item in administration expenses for donations and gifts amounted to only \$375.00. He stated that the members were charged an annual fee of \$10.00, which amount was merely deposited in the till. He confirmed that the premises contained an area of approximately 2,400 square feet and that when he purchased the building, he also arranged to purchase certain tenants'

fixtures, including shelves from what had been the "Scarborough Bridge Club". He stated that the original "Scarborough Bridge Club" had ceased operations in 1982.

The next witness called by the Applicant was Angus MacKenzie who had been a member of the "Milner Club" for the past six years and was a Vice-President. He stated that he had now been offered the job as Manager to replace Mr. Fraser. He stated that arrangements were being made to print membership cards, a monthly newsletter and that signs had been erected at the bar prohibiting minors and that guests must be signed in by a member. He stated that there had been an Annual Meeting held to reorganize the club and to appoint a new executive and that there were only 87 people present at the meeting. He stated that the Club supported various projects, including a run for muscular dystrophy and that they would invite boys on the soccer teams, which were sponsored by the Club, back to the Club for pop.

On cross-examination, the witness advised that he did not think that meetings of the executive had been necessary, but that he had been to at least three or four Annual Meetings during the six years that he had been a member. He confirmed that Mr. Fraser and Mr. Provan had been approved as the signing officers, but that they were not executives and only members, and he admitted that this was highly irregular. He confirmed that he had never been shown financial statements as a member of the Club and had no knowledge as to the disposition of the funds. He also stated that the Club had never reviewed the expenses of the Club and that any donations which were given were the decision of the Manager, Mr. Fraser.

Counsel for the Liquor Licence Board argued that the licence had been issued in the name of the "Scarborough Bridge & Social Club" which was apparently a share capital corporation and that none of the executive of the previous operation had anything to do with the Club and that everything had been delegated to Mr. Fraser and Mr. Provan. Counsel argued that the Club was being operated by Mr. Fraser and Mr. Provan as a profit making business for themselves and that this was borne out by the statement of income and expenses filed as an exhibit. He pointed out the fact that there were no Minutes of Meetings, no records of dues, no records of donations and he stated that the club was not a 'club' within the definition of Section 1(d)(3) of Regulation 581 of the Liquor Licence Act and that the Licensee was not

complying with Section 26 of the regulation. He submitted that the Liquor Licence Board was correct in revoking the said licence.

Counsel for the Applicant stated that it was very difficult to obtain information which was compounded by the fact that the members thought that they were a club and that they only needed to pay the sum of \$50.00 to change the name of the Licensee. He stated that the members had now shown an intent to deal properly with the Club and had attempted to comply with the deficiencies. He referred to the fact that there were defects in the financial statements and that they were incomplete, but that if the licence was revoked, there would be a hardship on the community in that there would be a loss of sponsorship of soccer clubs. Counsel acknowledged that the documents submitted as exhibits with respect to a new application for a charter for the "Milner Club" and lease and other supporting documents were draft documents only. The draft lease referred to the premises as being used for a dental office with an area of 673 square feet and he stated, that this had been prepared in error.

The Tribunal finds that the Applicant is carrying on activities contrary to the Liquor Licence Act and its regulations, and that the licence holder is not a 'club' as defined therein. It is difficult to understand how the original club licence would have been issued to a share capital corporation as this, in itself, would be contrary to the requirements of the regulations. The evidence would confirm that Mr. Fraser and Mr. Provan, the landlords, were operating the Club and that the net profit of the Club operations for the 23 months ending March 31, 1986, amounted to \$154,729.00. Admittedly, mortgage payments and taxes and other expenses would have been surplus and it would appear that Mr. Fraser and Mr. Provan have retained all remaining monies as their own. The financial statement shows total gross sales of \$302,667.00 and yet donations and gifts amounted to only \$375.00. The Tribunal is disturbed that this type of operation could exist undetected for a period of approximately three years. The original investigation by the Liquor Licence Board was commenced in May of 1985, and no real attempt had been made since that time to operate the Club as a proper club within the definition of the regulations of the Liquor Licence Act. The method of operation of the bank account, the lack of proper meetings, the failure of the executive of the club to have any say in the operation of the club and the complete lack of accountability with respect to any surplus and profits are

all additional evidence to confirm the Tribunal's findings that this is not a proper club operation. There is also before the Tribunal the uncontradicted evidence of the Investigator of the Liquor Licence Board who was able to walk into the premises as a member of the public, unknown to any members and not introduced by a member, and purchase liquor. There is also the evidence before the Tribunal of the conviction by Mr. Fraser as Manager in charge of the premises of permitting liquor to be removed from the licensed premises.

Accordingly by virtue of the authority vested in it under Section 14(3) of the Liquor Licence Act, the Tribunal hereby confirms the Decision of the Liquor Licence Board dated the 19th day of November, 1985, revoking the licence and authorizes the Board to revoke the said licence forthwith.

VILLAGE GATE THEATRICAL PRODUCTIONS INC.
(THE DIAMOND RESTAURANT)

APPEAL FROM THE DECISION OF THE
LIQUOR LICENCE BOARD OF ONTARIO

TO ATTACH A TERM AND CONDITION TO THE
DINING LOUNGE LICENCE

TRIBUNAL: STEPHANIE J. WYCHOWANEC, Q.C., CHAIRMAN, PRESIDING
KENNETH VAN HAMME, MEMBER
RONALD W. CHEMIJ, MEMBER

APPEARANCES:

GERALD A. LEVITAN, representing the Applicant

S.A. GRANNUM, representing the Liquor Licence Board

DATE OF
HEARING: 21 July 1986

Toronto

REASONS FOR DECISION AND ORDER

The Applicant, Village Gate Theatrical Productions Inc., appeals the Decision of the Liquor Licence Board of Ontario dated October 22nd, 1985, wherein the Board attached a term and condition to the Dining Lounge Licence held by the Applicant. The term and condition was that the sale and service of alcoholic beverages shall cease at 10.00 p.m. daily, until there has been compliance and the Licence Holder makes application to the Board for removal of same pursuant to Section 9(2) of the Act.

The "compliance" was compliance with Section 9(6) of Regulation 581 made under the Liquor Licence Act. This subsection requires that total receipts from the sale of food in any month shall be not less than 40 per cent of the total receipts from the sale of liquor and food in that month. There is no dispute that this food/liquor ratio has not been met since the business was acquired by the present principals in 1984.

The licensed premises consist of three areas: the southwest centre section which has a dance floor and stage; the east side section and the south centre balcony which overlooks the dance floor. The total capacity is 686 persons. The Applicant holds a Dining Lounge Licence which

was initially obtained in 1983 for a dinner/theatre type of operation. Sometime later, noting that there were few night clubs in Toronto, the Applicant promoted a nightclub/dance club atmosphere with live entertainment and dancing emphasized.

The two Inspectors with the Liquor Licence Board who gave evidence found the premises well run with apparently no contraventions of the Liquor Licence Act save and except for the failure to meet the food/liquor ratio. Mr. Lownds, one of the Inspectors who visited the premises in early July, 1986, said that the east side section had recently been refurbished to make it more suitable for use as a proper dining room and that the kitchen facilities were adequate to provide full food service for this section. At the time of this hearing, this dining room opened at 8:00 p.m.

Exhibit 12A contains the liquor/food reports for the period October 1984 to April 1986 inclusive. During this period, the highest percentage of food sales was in December, 1985, when it reached 29% of all sales in that month. Exhibit 12B provides ratios for the months of May and June 1986. The percentage of food sales during these months was 22% and 25% respectively. Although food sales have improved since April 1985, the percentage of food sales has hovered around 20% since the beginning of 1986.

Several witnesses, including Patrick Kenny who is President of the Corporation, gave evidence as to the steps taken by the Applicant to increase food sales. The latest of these efforts was to turn one of the rooms into a "first class upscale dining room" and to provide banquet and catering facilities. Mr. Kenny said some \$30,000 had been spent to make this transformation. The 'new' dining room called the Blue Flamingo had just opened on July 15, 1986, and it had not yet been fully promoted or marketed to the public. The Tribunal was assured that if the new room caught on with the public, then the required food/liquor ratio would be met.

A number of individuals engaged in promoting and showcasing new Canadian musicians and artists, and one reporter, all spoke highly of the Diamond (the name of the premises) as a place to show new Canadian acts. The word 'unique' was often applied in describing the atmosphere and premises. All agreed that if the premises were closed, the effect on young Canadian musicians and comics would be negative. The Applicant also filed a lengthy petition and numerous letters praising the Diamond and urging that it be allowed to operate.

Two witnesses living in the immediate vicinity were called, one by the Applicant and one by the landlord. Miss Mair, living next door to the club, testified that she could not hear the music or any noise from it and that she had no problems with patrons. Mr. Hamilton, living somewhat further away, said he was at times disturbed and felt intimidated by the noise and actions of patrons leaving the club late at night. However, he admitted that he had never called the police to register complaints.

In his submissions to the Tribunal, Mr. Crannum on behalf of the Board pointed out that the food/liquor ratio of not less than 40/60 was mandatory and that the ratio had never been met since the club concept had been adopted. He noted that there had been no attempt to open the dining facilities at an earlier hour such as 5:00 p.m. which may have helped to increase the food sales. He argued that the Applicant has had some two years to comply with the Liquor Licence Act and that was more than reasonable time. Given these facts, he said he could see no reason to disturb the Order of the Liquor Licence Board, particularly as there was no evidence as to a better solution to achieve the required ratio.

Mr. Levitan, on behalf of the Applicant, suggested that this was not a 'standard liquor/food problem' because the Diamond was a unique establishment being a restaurant, dance hall and a place to hear live acts - all in one. He pointed out that on the evidence before the Tribunal, the operation was well run. He said that the evidence also showed a valid, although at times unsuccessful, effort on the part of the Applicant to comply with the Act and regulations. He argued that greater emphasis should be given to the actions taken by the principals in the last three months to comply. He warned the Tribunal that if the club closed, the jobs of some 65 - 70 club employees would be in jeopardy, as would those of thousands of musicians and local artists. He noted the Government's publicly stated intention to review the Liquor Licence Act in general and the food/liquor ratio in particular, in light of today's attitudes. He urged the Tribunal to keep all these matters in mind, and in exercising its discretion, to make an enlightened decision. He noted that the present licence expires on December 15th, 1986, and said that there would be no prejudice to allow the licence to take its course and give the establishment the time to show that it could comply with the Act.

The ultimate penalty for breaching the Liquor Licence Act is total suspension of the licence. There is, however, a discretion to impose a lesser penalty by attaching terms and conditions to the licence until such time as full compliance with the Act is attained.

The Applicant has asked this Tribunal to make an enlightened decision, by which it means, to do nothing which would interfere with the way the Applicant is carrying on business. The Tribunal is asked to do this for a number of reasons, but especially because the Act is under review and may be changed so that what is now non-compliance may be allowed in the future.

The Tribunal cannot base its decision on what people would like the law to be or what it expects the law to be in the future. The decision must be based on what the law is now. If those affected by such law are dissatisfied with the result of the present legislation, their remedy is to go and knock at the doors of those who enacted it, not at the doors of this Tribunal.

Mr. Kenny admitted that he knew that he had a Dining Lounge Licence when he decided to change the nature of the business from a dinner/theatre operation to what is in essence a disco night club. It should have been apparent to him and his managers, from the very beginning, that the type of business he was operating was not conducive to the consumption of food, although it was very conducive to the consumption of liquor. Nevertheless, in a period of two years, he did little to remedy the situation. Even after the Liquor Licence Board issued its Proposal on June 21st, 1985, well over a year ago, the Applicant has not taken adequate steps to increase food sales to the legally required minimum. The Applicant now comes to this Tribunal saying it has a brand new, untried approach to solve the problem and asking for additional time - at least to the end of the year. It is interesting to note that the submission (Exhibit 2A) which was filed by the Secretary of the Applicant and then solicitor, dated January, 1986, suggested that another six months would be sufficient in which to achieve compliance with the Act. There is still no compliance - far from it in fact.

The Tribunal accepts the evidence that this business is well run, that it provides a special, if not unique forum for new talent and that it is a good corporate citizen in the community. No doubt the Liquor Licence Board, if it had the

same evidence before it, would have reached the same conclusions on these matters. However, the fact is that in one particular aspect of its business operation, the Applicant is breaking the law. This Tribunal cannot gloss over or ignore this fact. The Applicant could have achieved the mandatory ratio by significantly changing its business direction. It declined to do so and has instead made what could be described as cosmetic changes in the overall operation. These changes have not produced the desired result of increasing food sales to 40 percent of total food and liquor sales. Whether the latest change will have the hoped for effect remains to be seen. We sincerely hope it does.

The solution put forward by Mr. Levitan is not acceptable given the already very long period of non-compliance. To allow matters to continue as they are would be very discriminatory in favour of the Applicant vis a vis all other businesses licensed under the Liquor Licence Act which fit their business to the licence and do comply with the Act and regulations. Taking all matters into account and mindful of the possible negative effect its decision may have on the Applicant's employees and others, the Tribunal finds that the term and condition attached to the Dining Lounge Licence of the Applicant by the Liquor Licence Board is reasonable under the circumstances.

Accordingly by virtue of the authority vested in it under Section 14(3) of the Liquor Licence Act, the Tribunal hereby confirms the Decision of the Liquor Licence Board dated the 22nd day of October, 1985 and directs the Board to set the date of commencement of the said "Term and Condition".

WEST TORONTO INTER-CHURCH TEMPERANCE FEDERATION

APPEAL FROM A DECISION OF THE LIQUOR LICENCE BOARD

TO APPROVE THE ISSUANCE OF A CLUB DINING LOUNGE
LICENCE

RE:
MALTA BAND CLUB

TRIBUNAL: STEPHANIE J. WYCHOWANEC, Q.C., CHAIRMAN, PRESIDING
HELEN J. MORNINGSTAR, MEMBER
DENNIS J. EGAN, MEMBER

APPEARANCES:

W.H. TEMPLE, (Secretary to the Federation),
representing the Applicant

GEORGE MALLIA, (President), representing the
Malta Band Club

S.A. GRANNUM, representing the Liquor Licence Board

DATE OF

HEARING: 2 December 1985

Toronto

REASONS FOR DECISION AND ORDER

This is an appeal by the West Toronto Inter-Church Temperance Federation (the "Federation") from the Decision of the Liquor Licence Board of Ontario (the "Board") dated July 25, 1985, following a hearing wherein the Board granted approval to the issuance of a club dining lounge licence to the Malta Band Incorporated (the "Club") for its premises situated at 235 Medland Street, Toronto.

Under the Terms and Conditions contained in section 26(2) of the regulations to the Liquor Licence Act, a holder of such licence shall not sell liquor except to a member of the club, spouse of a member or registered guest of a member or such person as may be specified in the by-laws or constitution of the club as having access to the privileges of the club by reason of a reciprocal agreement with another club.

The Federation, an unincorporated volunteer organization, was represented at the hearing by its President Derwyn A. Foley and its secretary, William H. Temple. The basis of the appeal of the Federation is contained in its letter dated November 22, 1985, filed as Exhibit 10. The second and third paragraphs of the letter read as follows:

In 1909 the City of Toronto was expanding westward, and approaching the City of West Toronto, and asked them [sic] to unite with the City of Toronto. This was agreed to providing the City of Toronto would respect their dry by-law. Toronto agreed to this and signed a statement which said that no liquor selling establishments could be opened until the agreement had first been voted out by a majority of the people. This of course referred to clubs private or otherwise.

The granting of this Licence right in the centre of the dry [sic] would be in direct defiance of the will of the people as expressed in three liquor plebiscites held in 1966, 1972 and 1984. In all three votes the turn-out was bigger than in municipal elections and with more than 60% opposed to liquor selling establishments.

On the other hand, the Club submits that the prohibition contained in the Liquor Licence Act against the sale of liquor in a prohibited area does not apply to private clubs by virtue of Section 63(2) of Ontario Regulation 581 if the club is not otherwise disentitled to a licence. Mr. Grannum, counsel on behalf of the Liquor Licence Board supported this position.

On the basis of the undisputed evidence provided to it, the Tribunal finds that:

- the Club is a club within the meaning of the Liquor Licence Act;
- the Club premises are situate in a "dry area";
- the premises meet the health and safety standards of the Province of Ontario;
- although incorporated in 1977 as a non-profit organization without share capital, the Club has been in operation since 1971;

- the Club has occupied the premises at 235 Medland Street, Toronto since 1976;
- special occasion permits have been issued to the Club in the past;
- there are two other private member clubs in close proximity to the Club premises both of which have a Club dining lounge licence.

No one, other than the Federation, opposed the Club's application for a club dining lounge licence even though a public notice relating to the application was posted on the door of the Club's premises and a public notice was published in the Toronto Star on April 18 and April 25, 1985, and a second chance for input was provided by a subsequent notice relating to this appeal, published by the Tribunal, again in the Toronto Star, on November 18th, 1985.

There was some disagreement about the characterization of the immediate neighbourhood and the proximity of the nearest residents to the Club's premises. Evidence given by the secretary of the Club, Mr. Sam Borg and by its President, Mr. George Mallia, shows that although the entrance to the Club premises is off Medland Avenue some twenty feet south of Dundas Street, the property is actually situated on the corner of Dundas Street West and Medland. The main or first floor of the property is occupied by retail stores entered off Dundas Street. On the corner opposite the Club's premises, is a funeral home. Mr. Mallia stated that the property had been chosen with care because it was the intention of the Club from its inception to stress the band activity and to teach the playing of band instruments. It was therefore important to the Club to have no immediate adjoining neighbours who could be disturbed by the sound of band music. The premises chosen met this need. Mr. Borg and Mr. Mallia also testified that the first residential property was some 120 to 150 feet south of Dundas Street on Medland Avenue. The Liquor Licence Board Inspector, called by Mr. Grannum, classified the area as mainly commercial. The Tribunal agrees with the Inspector, that the immediate area is not what is generally regarded as a residential area.

The Tribunal was impressed by the integrity and sincerity of the members of both the Federation and the Club.

Under the scheme of the Liquor Licence Act, an applicant for a liquor licence is entitled to such licence except where certain circumstances exist. Section 25 of the Act provides that subject to the provisions of sections 26

and 27 no licence shall be issued in a municipality where the sale of liquor was prohibited under the law as it existed immediately before February 4, 1976 or if not prohibited by the law, where no licence has been issued since September 16, 1916. The area in which the Club premises are situate is a prohibited area as provided in section 25.

However, the matter does not stop here. Section 63(2) of Ontario Regulation 581 under the Act states: "Clubs that have been in active operation for a period of not less than three years are exempted from the provisions of sections 25, 26 and 27 of the Act."

It was argued by Mr. Foley and Mr. Temple that the agreement referred to in the Federation's letter takes precedence over any statutory enactment made subsequent thereto and therefore, the Regulation has no effect. This Tribunal does not have the agreement before it and so has no way of knowing what the specific provisions were, or if indeed there was an agreement. Mr. Grannum made reference to By-law 551 which was the local option by-law of the former City of West Toronto but did not go into details.

The Ontario Court of Appeal in Croation Estates Ltd. v. City of Toronto found that that by-law had been effectively repealed by the enactment of the Ontario Temperance Act in 1916.

The Tribunal finds that even if there was an agreement, as alleged, provincial legislation validly enacted overrides any municipal agreement or municipal by-law in conflict with that legislation.

The Legislature and the Lieutenant Governor-in-Council by the wording of their respective enactments have shown their collective intention to give clubs as defined in the Regulation special status under the Liquor Licence Act. On the one hand, clubs are exempt from certain of the provisions of the Act but on the other hand, they are only entitled to a liquor licence with limited application.

Section 10 of the Interpretation Act requires that "every Act...shall receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act according to its true intent, meaning and spirit".

It is the opinion of the Tribunal that the prohibitions contained in sections 25, 26 and 27 of the Act have no application to a club situate in any dry area and that unless otherwise disentitled, a liquor licence should issue to the Malta Band Club. In addition to the provisions contained in section 25 of the Act, section 6 sets out the exceptions to the entitlement. There was no suggestion that the Club was not entitled to a liquor licence by virtue of the provisions of clauses a to f inclusive of subsection 1 of section 6. Clause g of the said subsection states that "in the case of an application for a licence, the issuance of the licence is not in the public interest having regard to the needs and wishes of the public in the municipality in which the premises is located." As noted above, no member of the public other than the Federation opposed the application by the Club. The application for the club dining lounge liquor licence was fully supported by the Club members. The Tribunal is satisfied that given the limited nature of the licence applied for, the Club ought not to be disentitled to such licence by virtue of this clause.

The Tribunal having considered the evidence and the submissions made to it and by virtue of the authority vested in it under Section 14(3) of the Liquor Licence Act, hereby confirms the Decision of the Liquor Licence Board dated July 25th, 1985, which approved the issuance of a club dining lounge licence to the Malta Band Club.

FREDERICK A. BULLOCK

APPEAL FROM A PROPOSAL OF THE
REGISTRAR OF MOTOR VEHICLE DEALERS AND SALESMEN
TO REFUSE REGISTRATION

TRIBUNAL: STEPHANIE J. WYCHOWANEC, Q.C., CHAIRMAN, PRESIDING
DR. STEPHEN G. TRIANTIS, MEMBER
RALPH C. PHILLIPS, MEMBER

APPEARANCES:
WAYNE R. WATTERWORTH, representing the Applicant
A.N. MAJAINA, representing the Registrar of
Motor Vehicle Dealers and Salesmen

DATE OF
HEARING: 22 July 1986 Toronto

REASONS FOR DECISION AND ORDER

Frederick A. Bullock seeks to be registered as a salesman under the Motor Vehicle Dealers Act. In verifying Mr. Bullock's application, the Registrar under this Act found that Mr. Bullock had been less than totally candid in answering a number of questions on the application.

Mr. Bullock had previously been registered as a funeral director under the Funeral Services Act. In April, 1985, the Discipline Committee established under that Act found Mr. Bullock guilty of professional misconduct because he had converted to his own use monies paid in trust to him under the Prearranged Funeral Services Act. The Discipline Committee revoked his licence as a funeral director.

Earlier in the same month, Mr. Bullock had been convicted of 78 counts of theft contrary to Section 294(a) of the Criminal Code. The total amount involved in these thefts was some \$119,900.

Because of this past criminal record and because Mr. Bullock failed to disclose fully the magnitude of his professional misconduct, the Registrar proposed to refuse to grant registration. It is from this Proposal that Mr. Bullock now appeals.

Frederick Bullock is 49 years old, married, with three adult children no longer living at home. He has a grade 12 education. According to the evidence, in 1963 Mr. Bullock began working for his father in the latter's funeral service business. In 1976, he purchased the business from his father and continued to operate it until his licence was revoked in April 1985.

It appears from the Certificate of conviction, which was filed as Exhibit 6 in these proceedings, that as soon as Mr. Bullock acquired the business, he began converting the monies paid to him in trust under the Prearranged Funeral Services Act. These monies had been placed in a general trust account and through the whole period - 1976 to 1985, Mr. Bullock persistently continued to take and use these trust funds to pay for operating expenses and for his own use. Because the temptation to use these monies was so great, Mr. Bullock, in early 1985, began setting up individual trust accounts in the names of persons who had prepaid for funeral services. However, notwithstanding his good intentions, he continued to convert trust funds in the general trust account to his own use.

Mr. Bullock told the Tribunal that he knew what he was doing was very wrong but that he intended to provide funeral services to those who had prepaid even if the funds were no longer in the account.

It is to be noted that during this same period, 1976 - 1985, it appears that Mr. Bullock knowingly provided false information concerning prearranged funerals on the annual application for renewal of his licence contrary to the Funeral Services Act.

The conversions were uncovered during a spot check made by an Inspector appointed under the Funeral Services Act. The police were advised and subsequently, the 78 charges under the Criminal Code were laid. Mr. Bullock pleaded guilty to all charges. The original convictions carried a sentence of 60 days imprisonment on each count to be served intermittently and concurrently. A compensation order under Section 653 of the Criminal Code was made and Mr. Bullock was placed on probation for 30 months.

The Crown appealed the sentence. The Court of Appeal increased the custodial sentence from 60 days intermittent to one year for each count concurrent. The probation order was deleted but the compensation order was confirmed.

In reaching its decision, the Court stated in part as follows:

We are all of the view that having regard to the serious breach of trust committed by the respondent over a long period of time and the amount involved the sentence is wholly inadequate to reflect the gravity of the offence and does not give adequate weight to the factor of general deterrence.

Giving this matter our best consideration we have come to the conclusion that a sentence of 12 months would be an appropriate sentence taking into account the mitigating factors and that the respondent has endeavoured to compensate the victims in the manner provided in the agreement of sale. We also recognize that re-incarcerating a person after he has served the term of imprisonment imposed by the trial judge imposes an additional hardship upon him. Were it not for these facts, we would have felt constrained to impose a somewhat longer sentence than the sentence of 12 months.

The pre-sentence report on Mr. Bullock states that

With the exception of these present charges, Fred Bullock appears to be a model citizen. He is involved in his community, he is a good family man, and churchgoer. It appears that criminal doings of any kind would be out of character for this individual.

Mr. Bullock sold his business in March 1985. As part of the agreement, the purchasers agreed to credit those persons, who had prepaid funeral services arranged with Mr. Bullock, up to \$1,500.00 for future services. This is the compensation to victims referred to by the Court of Appeal.

Mr. Bullock is now employed by Silverthorne Dodge Chrysler Inc. Mr. Silverthorne, the President of this dealership, was aware of Mr. Bullock's convictions when he hired him in 1985. He spoke very highly of Mr. Bullock, considering him to be one of his better employees. Mr. Silverthorne supported Mr. Bullock's application to be registered under the Motor Vehicle Dealers Act. He believed there would be no risk to the public if registration was granted because of the way his dealership handles the sales paperwork.

In the Brenner decision, the Divisional Court said:

The effect of s.7(4) [of the Motor Vehicle Dealers Act] is that the Tribunal should only have refused to direct the Registrar to carry out his proposal if it thought the Registrar was in error in concluding that the past conduct of the applicant afforded reasonable grounds for belief that he would not carry on business in accordance with law and with integrity and honesty.

The Tribunal believes that when assessing the probable future actions of individuals, some reliance may be placed on the past acts of the individual to be assessed.

In reviewing all of the evidence presented to it, the Tribunal notes that the thefts were committed over a long period of time - almost a decade. They were committed by a mature individual who evidently had the confidence and respect of the community. He abused this confidence in a shameful manner. The fact that he co-operated with the police after he was found out does not show honesty or integrity. By his own admission, he was tempted by the easy access he had to the general trust account and even though he knew that what he was doing was wrong, he could not resist that temptation. While Mr. Silverthorne may operate in such a manner to keep temptation out of reach, other dealers may not and there is nothing to prevent Mr. Bullock from changing employers. Although Mr. Bullock maintained that he did not intend to mislead the Registrar of Motor Vehicle Dealers, he did not fully disclose all the facts surrounding his convictions and loss of licence. He had certainly deliberately misled the Registrar under the Funeral Services Act.

The most recent theft appears to have taken place in February, 1985, and although Mr. Bullock has served his sentence, in the Tribunal's opinion, not enough time has elapsed to show that he has indeed reformed. Although Mr. Bullock stated his intention to pay back the monies he stole, to date he has done little in this regard. It was pointed out that if he could earn a better salary, he could carry out his intentions much quicker. That may be so, but that cannot be the basis for granting registration. The public interest in general must be paramount.

Given the evidence before it, the Tribunal is of the opinion that the Registrar was not in error in his conclusion. The refusal to register Mr. Bullock as a salesman under the Motor Vehicle Dealers Act will not deprive him of his livelihood. He was and is able to hold any position with Mr. Silverthorne, other than as a registered salesman. Mr. Bullock is also free to go into sales and marketing, if that is his bent, in any other business that is not regulated by this Province.

Mr. Bullock's conduct to date does not satisfy this Tribunal that in future, he will be financially responsible and that his conduct will be lawful. In time, this evidence may be available. The Tribunal directs Mr. Bullock to Section 8 of the Motor Vehicle Dealers Act which reads:

A further application for registration may be made upon new or other evidence or where it is clear that material circumstances have changed.

For the present, the Tribunal holds that the Registrar's Proposal must be upheld. Accordingly by virtue of the authority vested in it under Section 7(4) of the Motor Vehicle Dealers Act, the Tribunal directs the Registrar to carry out his Proposal.

SCOTT BURRILL

APPEAL FROM A PROPOSAL OF
THE REGISTRAR OF MOTOR VEHICLE DEALERS & SALESMEN
TO REVOKE THE REGISTRATION

TRIBUNAL: STEPHANIE J. WYCHOWANEC, Q.C., CHAIRMAN, PRESIDING
MARY G. CRITELLI, VICE-CHAIRMAN AS MEMBER
J.T. HOGAN, MEMBER

APPEARANCES:

STEPHEN A. AUSTIN, representing the Registrar
of Motor Vehicle Dealers and Salesmen

No one appearing for the Applicant

DATE OF

HEARING: 20 May 1986

Toronto

REASONS FOR DECISION AND ORDER

This is an appeal by Scott Burrill from the Proposal of the Registrar of Motor Vehicle Dealers and Salesmen dated July 29th, 1985, wherein the Registrar proposed to revoke the Applicant's registration under the Motor Vehicle Dealers Act. The reasons given by the Registrar for the Proposal were that in the Registrar's opinion Burrill's registration should be revoked as his past conduct afforded reasonable grounds for belief that he would not carry on business in accordance with law and with integrity and honesty. The Applicant did not appear at the hearing. However, the Tribunal is satisfied that he was properly served with the Notice of Hearing.

Four witnesses were called in addition to the Registrar to give evidence as to the circumstances leading up to the Registrar's Proposal. The allegations contained in the Proposal with reference to Scott Burrill have been proved to the satisfaction of the Tribunal.

The Tribunal finds that Scott Burrill was involved in a series of transactions in which he, by deceit, misrepresented the odometer readings on several motor vehicles. This finding is based, firstly, on the documents contained in Exhibit 8, and confirmed by the testimony of three buyers of cars from the dealership where Mr. Burrill

worked. In addition, Scott Burrill pleaded guilty to three criminal charges. Included in the documents are three Certificates of Conviction under the Criminal Code and the fines levied against Scott Burrill.

Under the circumstances, the Tribunal finds that the Registrar did have reasonable grounds for belief that Mr. Burrill would not carry on business in accordance with law and with integrity and honesty.

Accordingly by virtue of the authority vested in it under in it under Section 7(4) of the Motor Vehicle Dealers Act, the Tribunal directs the Registrar to carry out his Proposal.

CENTENNIAL PLYMOUTH CHRYSLER (1973) LTD.
and D. BROWN MOTORS (BARRIE) LIMITED
and GORDON D. COATES

APPEAL FROM A PROPOSAL OF
THE REGISTRAR OF MOTOR VEHICLE DEALERS & SALESMEN
TO REVOKE THE REGISTRATIONS

TRIBUNAL: MATTHEW SHEARD, Q.C., VICE-CHAIRMAN, PRESIDING
F. THOMAS PEOTTO, MEMBER
KEITH COULTER, MEMBER

APPEARANCES:
ROBERT J. CARTER, Q.C., representing the Applicants
S.P. MARTIN, representing the Registrar of
Motor Vehicle Dealers and Salesman

DATES OF 3, 4, December 1985
HEARING: 13 March 1986 Barrie
Toronto

REASONS FOR DECISION AND ORDER

The Applicants' appeal from the Proposal of the Registrar of Motor Vehicle Dealers and Salesmen to revoke their respective registrations; dealers' registrations in the case of the corporations and that of a salesman in the case of Gordon D. Coates. The Registrar's Reasons underlying this Proposal were stated in part as follows:

- A) In my opinion, the Company's [Centennial Plymouth Chrysler (1973) Ltd.] registration should be revoked as:
 - i) the past conduct of the Company affords reasonable grounds for belief that it will not carry on business in accordance with law and with integrity and honesty; or
 - ii) the past conduct of its officers or directors affords reasonable grounds for belief that its business will not be carried on in accordance with law and with integrity and honesty; or

- iii) the Company has carried on activities that are in contravention of the Act or the regulations.
- B) In my opinion, Coates' registration should be revoked as:
 - i) the past conduct of Coates affords reasonable grounds for belief that he will not carry on business in accordance with law and with integrity and honesty; or
 - ii) Coates has carried on activities that are, or will be, if he is registered, in contravention of the Act or the regulations.

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PARTICULARS

IT IS ALLEGED AS FOLLOWS:

1. That Centennial Plymouth Chrysler (1973) Ltd. (the "Company") is a corporation registered under the Act to carry on business as a motor vehicle dealer.
2. That Gordon D. Coates ("Coates") was at all material times, and is the President, Director and sole Shareholder of the Company. Coates was at all material times in control of the Company and was actively involved in all of its operations.
3. On or about the 24th day of November, 1982, the Company was convicted of an offence under Section 33(1) of the Act in that they did, upon the sale of used motor vehicles fail to show the recorded odometer readings on the sales orders contrary to Section 16(2)(o) of Ontario Regulations 98/71 made under the Motor Vehicle Dealers Act. Upon conviction the Company was fined \$403.00.

4. On or about the 24th day of November, 1982 Acadia Rent A Car Ltd. and Klean Auto Leasing, two other companies controlled by Gordon D. Coates were each convicted of that same offence under the Act. Klean Auto Leasing was fined \$303.00 on conviction and Acadia Rent A Car Ltd. was fined \$403.00 on conviction.
5. On or about the 9th day of September, 1985 the Company pleaded guilty and was convicted of 13 counts of odometer tampering under Section 27(1) of the Weights and Measures Act, and 2 counts of fraud under Section 338(1) of the Criminal Code of Canada. The Company was fined \$3,000.00 on each count for a total of \$45,000.00 in fines.

[Note: These convictions were entered in the District Court of Ontario following the trial before the Honourable Judge A.P. Dilks]

6. That the aforementioned convictions related to the alteration of odometers on motor vehicles.
7. That at all material times Coates was the sole shareholder, a Director and President of the Company and was actively involved in the operation of the Company and in control of its operations.
8. That D. Brown Motors (Barrie) Limited ("Brown Limited") is a corporation registered under the Act to carry on business as a motor vehicle dealer at 437 Dunlop Street West in the City of Barrie.
9. That Coates owns approximately two-thirds of the shares of Brown Limited and is a Director and officer of that corporation. Coates is active in the operation of that corporation.

The Registrar's Proposal recites that section 6 of the Act provides that:

...subject to Section 7, the Registrar may revoke a registration for any reason that would disentitle a registrant to registration under section 5 if he were an applicant, or where the registrant is in breach of a term or condition of the registration;

Section 5 provides:

- (1) An applicant is entitled to registration or renewal of registration by the Registrar except where,
 - (a) having regard to his financial position, the applicant cannot reasonably be expected to be financially responsible in the conduct of his business; or
 - (b) the past conduct of the applicant affords reasonable grounds for belief that he will not carry on business in accordance with law and with integrity and honesty; or
 - (c) the applicant is a corporation and
 - (i) having regard to its financial position, it cannot reasonably be expected to be financially responsible in the conduct of its business, or
 - (ii) the past conduct of its officers or directors affords reasonable grounds for belief that its business will not be carried on in accordance with law and with integrity and honesty; or
 - (d) the applicant is carrying on activities that are, or will be, if the applicant is registered, in contravention of this Act or the regulations.

The evidence presented at this hearing has completely satisfied the Tribunal that the convictions referred to above were justly and properly entered against Centennial Plymouth Chrysler (1973) Ltd. and that the wrongdoing in question was sufficient in nature and quality to justify the Registrar's Proposal in respect to that Applicant or any other applicant guilty or responsible for such wrongdoing.

Upon the evidence, the Tribunal is also satisfied that the allegation set out in the Registrar's Proposal to the effect that Gordon Coates "was at all material times, and is the President, Director and sole Shareholder of the Company" is also accurate and correct.

In the course of final submissions counsel for the Applicants put forward the argument that the aforesaid convictions of the corporate entity Centennial Plymouth Chrysler (1973) Ltd. did not affect its entitlement to registration upon a precise interpretation of section 5 of the Act. He argued that subsections 5(1)(a) and (b) referred not to corporate applicants but only to applicants who were persons. Corporate applicants were referred to in subsection 5(1)(c). That is to say, subsections 5(1)(a) and (b) refer exclusively to personal applicants; subsection 5(1)(c) exclusively to corporate applicants. Therefore, since subsections 5(1)(a) and (b) could not operate in respect to a corporation, the convictions registered against Centennial Plymouth Chrysler (1973) Ltd. had no relevance and could not affect that Corporation's entitlement to registration under the Act. Only if the past conduct of its officers or directors afforded reasonable grounds for belief that its business would not be carried on in accordance with law and with integrity and honesty could it be disentitled under the subsection which dealt with corporations, namely, subsection 5(1)(c). But Mr. Coates, who at all material times was and is the President, Director and sole shareholder of the Company, was not convicted of the consumer related charges to which the corporate applicant, his Company, pleaded guilty and was convicted.

The Crown withdrew its charges against Mr. Coates at or about the same time as his Company entered the guilty pleas and, therefore, the Judge had no option or opportunity to convict him. Similarly, the third Applicant was unaffected, so ran the argument.

The Tribunal has pondered these ingenious notions at length and not without a degree of relish for their subtlety. But in the end, it rejects them.

It has long been a generous and on the whole very sensible presumption of the common law that a child born to a married woman is the offspring of the lady's husband. But it is a rebuttable presumption. In wartime, where the husband had been for a year or more on service on the opposite side of the globe, perhaps in prison in a Japanese P.O.W. Camp, the arrival of an heir might have aroused in certain minds the suspicion of extraneous intervention. But the presumption of legitimacy would still persist unless formally rebutted.

Odometer spinning, like other dangerous practices, is rarely done in the presence of onlookers, but, to the contrary, we understand it is done behind closed curtains. However, when it is discovered and proven, we may take judicial notice that somebody or other is responsible; not just a corporate entity but an actual person because a corporate entity, for all its extraordinary powers, cannot physically spin an odometer anymore than it can get into a number of other kinds of trouble.

When a Corporation pleads guilty to that offence the matter does not end there so far as this Tribunal is concerned. We are willing, ready and able to presume that in the case of a closely-held and controlled corporation, something which has been proven in our view of this case to have been nothing less than an alter ego of Mr. Coates, a guilty plea of the fraud and crime of odometer tampering is prima facie evidence that the authorship of that wrongdoing was that of the person or persons in control of that Corporation. We welcome the opportunity to establish this principal if it has not been put on record before, and if we are wrong, we would be glad of the opportunity of having the error corrected.

One can easily think of cases where a corporation, especially a large corporation with many shareholders, could be convicted of serious consumer or criminal offences without there having been any knowledge or guilt of wrongdoing by the shareholders or even some or all of the directors. But in a case such as this, where very close control and beneficial ownership were entirely vested in one man, we would have to see evidence that that person, the person in charge was not involved in the established wrong-doing and in this case no such evidence was offered. We are not making a presumption of "guilty until proven innocent". But we are making a presumption that the person in charge was also informed, aware of and/or responsible for what was going on.

The standard of proof required before this Tribunal can reach a decision is not that of criminal law but is that arising from the Tribunal's jurisdiction which in turn is to be determined from the Act under which this Proposal was brought, as well, inter alia, as the Ministry of Consumer and Commercial Relations Act, the Statutory Powers Procedure Act and as we are assured, section 10 of the Interpretation Act. The legislation under which it is proposed to revoke the Applicants' registrations is consumer legislation designed to protect the public. It is not meant to punish but to protect. To that end, the Tribunal has no hesitation in stripping all three of these registrants of their respective registrations and thereby of their ability to do further harm to innocent individuals who venture into the market place.

At this point we are moved to quote and include in our Reasons the language of His Honour Judge Dilks in his Reasons for Sentence when the matters complained of in this case were before him:

...Society must be protected against practices such as this. The Ontario Court of Appeal...has clearly set forth that the principal factor, principal purpose in sentencing, must be the protection of Society...

...I have been reminded that maximum penalties are reserved for the worst example of the offence committed by the worst offender. And I have been urged to find that neither description is apt here. But it must be remembered that in addition to cold blooded, premeditated tampering for profit that the accused Corporation has in fact profited. I was urged to find that this is not the worst offence because these are only fifteen examples out of the hundreds of vehicles that had been sold. I cannot accede to that argument...I can think of very little that would be more serious, that would be more blatant...

During the presentation of evidence for the Applicants on the first day of the hearing, the Tribunal heard the testimony of a Mr. K. Arnold, who is Branch Manager of Chrysler Credit Canada Ltd., and he brought a letter beginning "To Whom It May Concern" from a Mr. W.R. Bradley who is the Vice-President of Chrysler Credit Canada Ltd. It seems that Mr. Coates' operations involve up to ten million dollars in credit being made available to him by Chrysler Credit and both Mr. Arnold and Mr. Bradley appear to have a high opinion of Mr. Coates and Centennial Plymouth Chrysler (1973) Ltd. and would like to see his and his Companies' registrations continued. That is because they are "efficient" and very profitable. But efficient and profitable operations which are also dishonest are not in the public interest which it is our duty to protect. When asked if he understood the word "condonation" or "condone", Mr. Arnold suggested they meant something like "we can live with it".

Odometer altering designed to bilk the public into paying more for an expensive product like a used motor car than it is worth is not something that the Registrar of Motor Vehicle Dealers and Salesmen is prepared to live with and neither is this Tribunal.

The fact that Mr. Coates' operation has been efficient and profitable must draw us to the conclusion that the fraudulent misdeeds were unnecessary to ensure the success or survival of his business but were simply motivated by greed and by some compulsion to cheat. In our view, greedy and compulsive cheats are the worst kind.

Accordingly and by virtue of the authority vested in it under Section 7(4) of the Motor Vehicle Dealers Act, the Tribunal upholds the Registrar's Proposal, finding that the corporate Applicants are disentitled to registration by operation of subsection 5(c) and Mr. Coates by that of subsections 5(a) and (b), and Orders and Directs the Registrar to implement the same forthwith upon the issuance of this Decision and the Reasons therefore.

Although the Decision does not turn on this point, returning briefly to subsection 5(1):

- (b) the past conduct of the applicant affords reasonable grounds for belief that he will not carry on business in accordance with law and with integrity and honesty;

the Tribunal is of the opinion that the relevant pronoun "he" ought to be interpreted as meaning "he", "her", or "it" as the context may best be served, so that a corporate entity ought not to be excluded from the scope of its operation. *

* Note: The above decision was appealed to the Supreme Court of Ontario (Divisional Court) by Centennial Plymouth Chrysler (1973) Ltd and D. Brown Motors (Barrie) Limited and Gordon Douglas Coates. The appeal had not been concluded at the time of this publication.

EASTWAY FORD SALES LIMITED
WILLIAM R. STOLLERY and
MICHAEL JAMES STOLLERY

APPEAL FROM A PROPOSAL OF THE REGISTRAR
OF MOTOR VEHICLE DEALERS AND SALESMEN

TO REVOKE THE REGISTRATIONS

TRIBUNAL: MATTHEW SHEARD, Q.C., VICE-CHAIRMAN, PRESIDING
WATSON W. EVANS, MEMBER
WILLIAM J. GUIGNION, MEMBER

APPEARANCES:

LINDA ROBINSON, representing
Eastway Ford Sales Limited

DOUGLAS G. GUNN, Q.C. and DAVID M. MILLER,
representing William R. Stollery and
Michael James Stollery

STEPHEN A. AUSTIN, representing the Registrar of
Motor Vehicle Dealers & Salesmen

DATES OF

HEARING: 28, 29 August 1986

St. Thomas

REASONS FOR DECISION AND ORDER

The Tribunal finds the following are the relevant
facts of this case:

1. That a certain statute exists among the current
Revised Statutes of Ontario being Chapter 453 thereof, The
Retail Business Holidays Act;

2. That the first two sections thereof reads in part as
follows:

1.-(1) In this Act,

(a) "holiday" means, [inter alia]

. . .

(iii) Victoria Day

. . .

(ix) Sunday, and

(x) any other public holiday declared by proclamation of the Lieutenant Governor to be a holiday for the purposes of this Act;

(b) "retail business" means the selling or offering for sale of goods or services by retail;

(c) "retail business establishment" means the premises where a retail business is carried on.

. . .

2.-(1) Every person carrying on a retail business in a retail business establishment shall ensure that no member of the public is admitted thereto and no goods or services are sold or offered for sale therein by retail on a holiday.

(2) No person employed by or acting on behalf of a person carrying on a retail business in a retail business establishment shall

(a) sell or offer for sale any goods or services therein by retail; or

(b) admit members of the public thereto

on a holiday.

The Tribunal also finds:

3. That there is good and sufficient evidence that the Applicants were carrying on business in violation of that statute. The precise particulars of that evidence need not, in the opinion of the Tribunal, be spelled out in this Reasons for Decision but are contained in the record of the hearing and have been admitted by the parties.

4. That the Applicants or the officers and directors of the corporate Applicant are or have been of the opinion that the statute in question is ultra vires or otherwise invalid or likely to be so found by a court of competent jurisdiction in due course as a result of proceedings already in train.

The Tribunal is of the opinion that the statute in question either may or may not at some future time eventually be struck down either by the Supreme Court of Canada or otherwise. The Tribunal is also of the opinion that the statute remains the law of Ontario until that happens.

Section 5 of the Motor Vehicle Dealers Act reads:

5.-(1) An applicant is entitled to registration or renewal of registration by the Registrar except where,

.

(b) the past conduct of the applicant affords reasonable grounds for belief that he will not carry on business in accordance with law and with integrity and honesty; or

(c) the applicant is a corporation and,

.

(ii) the past conduct of its officers or directors affords reasonable grounds for belief that its business will not be carried on in accordance with law and with integrity and honesty...

In the opinion of the Tribunal there is, as stated, good and sufficient evidence that the Applicants have, to wit, between January 19th, 1986 and May 25th, 1986 carried on business contrary to law and also contrary to honesty and integrity in that they flagrantly flouted The Retail Business Holidays Act on at least 19 separate occasions by carrying on business on Sundays and on Victoria Day.

The Registrar seeks and proposes that the respective registrations of the Applicants be revoked on the grounds that the past conduct of the Applicants and that of the officers and directors of the corporate Applicant affords reasonable grounds for belief that they will not carry on business in accordance with law and with integrity and honesty.

The Tribunal is satisfied that the Applicants have, during the period cited, flouted The Retail Business Holidays Act as alleged. It is also the view that this was very wrong

and was motivated by the desire to achieve a profit in an unfair manner by taking advantage of competitors who are in the habit of obeying the law and who remain closed on Sundays and other holidays. Such conduct ought to be suppressed. The Tribunal is also repelled by what it perceives from the evidence before it that the conduct of the Applicants has been self-interested conduct, misrepresented as a crusade against an unjust law. However, probably due more to the belated goading of the Ford Motor Company than to any moral consideration, the Applicants have, as the Tribunal is satisfied, discontinued the practices complained of and appear, in our view, unlikely to renew them.

Therefore, having regard to the language of Section 5(1)(b) of the Motor Vehicle Dealers Act which is future-looking rather than retrospective, and also relying on Section 7(4) of the Motor Vehicle Dealers Act, the Tribunal is bound to vary the Proposal of the Registrar and to permit the Applicants to retain their respective registrations upon the term and condition that the provisions of The Retail Business Holidays Act be strictly observed by the Applicants for so long as it remains law in this Province. Further, it invests the Registrar with the power to revoke any or all such registrations at his unfettered discretion should there be, in his opinion, any further violation of the said Retail Business Holidays Act or any other legislation which may at any future time be enacted to replace it.

The Tribunal strongly censures the Applicants and regrets its inability to penalize them in costs.

To summarize, by virtue of the authority vested in it under Section 7(4) of the Motor Vehicle Dealers Act, the Tribunal directs the Registrar of Motor Vehicle Dealers and Salesmen to refrain from implementing his Proposal at this time or until such future time as, in his discretion, he perceives the Applicants or any one of them to be in commission of any fresh violation of The Retail Business Holidays Act during its currency or any other legislation which may at any future time be enacted by the Legislature of Ontario to replace it. *

* Note: The above decision was appealed to the Supreme Court of Ontario (Divisional Court) by the Registrar of Motor Vehicle Dealers and Salesmen. The appeal had not been concluded at the time of this publication.

RICHARD S. MASON

APPEAL FROM A PROPOSAL OF THE
REGISTRAR OF MOTOR VEHICLE DEALERS AND SALESMEN
TO REFUSE REGISTRATION

TRIBUNAL: MATTHEW SHEARD, Q.C., VICE-CHAIRMAN, PRESIDING
BARBARA J. SHAND, MEMBER
ROBERT CONNOR, MEMBER

APPEARANCES:

FRED HEEREMA, representing the Applicant

STEPHEN P. MARTIN, representing the Registrar of
Motor Vehicle Dealers and Salesmen

DATE OF
HEARING: 15 July 1986

London

REASONS FOR DECISION AND ORDER

Richard S. Mason, the Applicant, has applied for re-registration as a salesman pursuant to the Motor Vehicle Dealers Act, R.S.O. 1980. The Registrar of Motor Vehicle Dealers and Salesmen has proposed to refuse registration to him on the grounds that, in his opinion, the Applicant is not entitled to registration under Section 5 of the Act as his past conduct affords reasonable grounds for the belief that he will not carry on business in accordance with law and with integrity and honesty. In support of that Proposal, it has been alleged as follows:

- 1) From the month of November 1982 through until the month of December 1984, the Applicant was registered under the Act as a motor vehicle salesman in the employ of Highbury Ford Sales Ltd. in London, Ontario.
- 2) The Applicant's employment with Highbury Ford Sales Ltd. was terminated on or about the 19th day of December, 1984 for reasons that he did 'convert deposits to his own use.'

3) Subsequently, the Applicant made application to be registered as a motor vehicle salesman in the employ of London Motor Products. That employment was terminated prior to the issue of registration and the application was abandoned.

4) By application dated August 14, 1985, the Applicant did apply under the Act to be registered as a motor vehicle salesman in the employ of Eastway Ford Sales Ltd in St Thomas, Ontario.

That application was the basis for this proposal.

5) On or about the 15th day of October, 1985, the Applicant met with the Registrar under the Act at the Ministry offices in Toronto. At that meeting, the Applicant admitted to the Registrar that he had converted the proceeds from the sale of motor vehicles by Highbury Ford Sales Ltd. to his own use.

In the opinion of the Tribunal the Registrar's allegations have been substantially established by the evidence set before the Tribunal during the course of this hearing although, as perhaps may be inevitable, these bare allegations offer rather less than a full and complete picture of all the details and facts of the case. It seems that the conversion of funds referred to was never the subject of any criminal charges. It also seems possible that the Applicant may have been under the mistaken impression that he was entitled to take these monies because he may have thought that funds were owing to him by his employer, Highbury Ford Sales Ltd. and that he was merely setting off money which came into his hands against money that he may have thought was due to him. But, notwithstanding that contention, the Tribunal is satisfied that the taking of funds complained of, which was the taking of deposit monies put into his hands by car buyers in eight cases, was grossly improper, that these funds were trust funds and that even if the Applicant did not know that such conversion was wrong he ought to have known it and therefore, whether he knew it or not, in either case, it cannot be justified. The Tribunal is satisfied that until he has made restitution, the Applicant is not a fit person to hold the registration sought.

The Applicant has asserted that monies are owing to him by his former employer and remain owing to him and that he intends to bring action to recover these. Section 8 of the Act provides "that a further application for registration may be made upon new or other evidence or where it is clear that material circumstances have changed". Should the Applicant manage to successfully sue Highbury in the appropriate court of law thereby establishing the validity of his contention, it is our view that the Registrar should entertain a fresh application for registration.

In the meantime, while it is extremely reluctant to deprive this gentleman of his livelihood and noting that he has been in many ways a good motor vehicle salesman, and that he has held such employment throughout most of his working life so far, the Tribunal is of the opinion that the Registrar's Proposal should be upheld. The Tribunal reaches this conclusion with great regret; however, the Applicant has demonstrated very improper conduct in our opinion as well as a very inappropriate attitude and a profound lack of appreciation of the responsibilities of a registrant under this Act, particularly of the fiduciary duties of such a registrant. And yet the Applicant's misconduct was something less than that of a thief properly so-called and we hope that he will find the means to improve his conduct in future, even that he will build a record of good conduct such as to enable him to live down the present complaints against him and regain the right to occupy a position of trust and confidence. Perhaps a good beginning would be for him to restore to the insurance or bonding company the loss which it has sustained through his misconduct. Were he to do that at some not too distant point in time we would urge the Registrar to favourably entertain a fresh application for registration.

Meanwhile for the present, and by virtue of the authority vested in it by Section 7(4) of the Motor Vehicle Dealers Act, the Tribunal directs the Registrar to carry out his Proposal.

PETER PSARROS

APPEAL FROM A PROPOSAL OF THE
REGISTRAR OF MOTOR VEHICLE DEALERS AND SALESMEN
TO REFUSE TO GRANT REGISTRATION

TRIBUNAL: STEPHANIE J. WYCHOWANEC, Q.C., CHAIRMAN, PRESIDING
HELEN J. MORNINGSTAR, MEMBER
HERBERT KEARNEY, MEMBER

APPEARANCES:
JOHN BURTON, representing the Registrar of
Motor Vehicle Dealers and Salesmen
No one appearing for the Applicant

DATE OF
HEARING: 6 November 1986 Toronto

REASONS FOR DECISION AND ORDER

The Tribunal has now had the opportunity of reading the Proposal of the Registrar. Since no person is present to represent the Applicant, and the Applicant himself is not present, and having read the Affidavit of Service which establishes, in the opinion of the Tribunal, full proof that the Applicant was served with the Notice of Hearing, and upon motion of Mr. Burton, counsel for the Registrar, it is hereby ordered that the Applicant's appeal be refused and the Registrar is directed to carry out his Proposal.

FRANK A. SZARKO

APPEAL FROM A PROPOSAL OF THE
REGISTRAR OF MOTOR VEHICLE DEALERS AND SALESMEN
TO REFUSE REGISTRATION

TRIBUNAL: MATTHEW SHEARD, Q.C., VICE-CHAIRMAN, PRESIDING
BARBARA J. SHAND, MEMBER
HERBERT KEARNEY, MEMBER

APPEARANCES:

FRANK A. SZARKO, on his own behalf

STEPHEN AUSTIN, representing the Registrar
of Motor Vehicle Dealers and Salesmen

DATE OF

HEARING: 12 November 1985

Toronto

REASONS FOR DECISION AND ORDER

The Applicant, having requested a hearing in the manner prescribed by the Act, attended without counsel. His problem, which was the intended subject of the hearing, was that he had been refused registration as a motor vehicle salesman because of his lengthy criminal record (which extended over a substantial period of time) and also because of allegedly false or incomplete answers provided by him in his form of application.

After the hearing had started, the Applicant interrupted the proceedings to state that he had not known that they would be so formal and that he desired to obtain a lawyer. The Tribunal was disinclined to grant an adjournment, at least not until it had further evidence as to the nature of the matter. Shortly thereafter, the Applicant announced his intention to wholly withdraw his application for registration at this time.

He is, of course, free to make a further application for registration if he so desires in accordance with the provisions of the Act. But in the meantime, he having withdrawn his current application (proprio motu), the Registrar's objections to that application cease to be in issue and the purpose of the hearing lapses.

By virtue of the authority vested in it under section 7(4) of the Motor Vehicle Dealers Act, the Tribunal orders and directs the Registrar not to register the Applicant and to implement his Proposal (filed) to that extent. It makes no findings, at this time, as to the Registrar's reasons underlying his Proposal.

ABCON LIMITED

APPEAL FROM A PROPOSAL OF THE REGISTRAR
UNDER THE ONTARIO NEW HOME WARRANTIES PLAN ACT
TO REFUSE TO RENEW THE REGISTRATION

TRIBUNAL: MATTHEW SHEARD, Q.C., VICE-CHAIRMAN, PRESIDING
HELEN J. MORNINGSTAR, MEMBER
JOHN CORSI, MEMBER

APPEARANCES:

JOHN T. GOODCHILD, representing the Applicant

BRIAN M. CHU, representing the Registrar under the
Ontario New Home Warranties Plan Act

DATES OF 17, 18 July 1985

HEARING: 29 January 1986

Kingston

REASONS FOR DECISION AND ORDER

This matter was brought on for hearing July 17th, 1985 in the City of Kingston and continued on the 18th day of July whereupon it was adjourned and has, this day, the 29th day of January 1986 been continued in the City of Kingston.

At the commencement of the proceedings January 29th, a discussion took place between the Vice-Chairman of the Tribunal and learned counsel as a result of which an agreement was reached as to the basic facts of the case. In evidence of such agreement a document was executed by Mr. Goodchild on behalf of the Applicant, Abcon Limited, and Mr. Chu on behalf of the Registrar which has been filed with the Tribunal as Exhibit 34 and which is entitled Agreed Statement of Facts, reading as follows:

1. Abcon Limited (hereinafter referred to as "Abcon") is a registered builder in the Ontario New Home Warranty Program (hereinafter referred to as "O.N.H.W.P.")
2. The subject property is enrolled in O.N.H.W.P.
3. Abcon has entered into a vendor/builder agreement with O.N.H.W.P.

4. Abcon entered into an agreement of Purchase and Sale with Mr. and Mrs. Silva which included the construction of a house and septic system.
5. O.N.H.W.P. received complaints with respect to the septic system on the subject property from the home owner within one year of possession.
6. Notices from O.N.H.W.P. to Abcon to remedy defective septic system were received by Abcon and were not complied with.
7. O.N.H.W.P. arranged for the replacement of the defective septic system at a cost subsequently invoiced to Abcon.
8. All demands by O.N.H.W.P. for reimbursement with respect to subject property were received by Abcon and have not been paid by Abcon.
9. The original septic system installed on the subject property failed to function properly as a result of either a failure to construct it in a workmanlike manner or a defect or defects in material.

Dated at Kingston this 29th day of January, 1986,
and the said agreement is over the signatures of counsel for both parties as aforesaid.

The Warranty which has been at issue in this case is set out in Section 13(1) of the Ontario New Home Warranties Plan Act Section 13(1)(a)(i)(ii)(iii), (b) and (c).

In this case, upon the facts as agreed to by the parties as aforesaid above, there is a clear breach of the warranty that the home should be fit for habitation. There also appears to be a major structural defect to the extent that the use for which the building was intended, that is say, residential occupancy in the normal course has been adversely and materially affected by the malfunction of the septic system.

The Tribunal has been referred to its decision in the case of G.H. Perkins Construction Ltd, released December 13th, 1985 in which a Tribunal's earlier decision in the case of Ernest L. Harper Limited was referred to with approval. The following language was employed:

Responsibility...rests with the person in charge, and, in a house construction project, that person is the builder. He is responsible both to the new homeowner and to the Warranty Program during the full period of the warranty. He may have a separate claim over against the sub-contractor, or even, in some hypothetical case, against an inspector if he can prove, say, gross negligence, wilful intent to defraud or some malicious intent to do damage or injury to him which is recognizable under law; but any such case would be a matter between the builder and the party or parties who had done injury to the builder, and the place to settle it would be in the court of proper competence and jurisdiction in the course of an action brought by the builder, but not within the context of the relationships he has with the Corporation or the new homeowner, which are clearly encompassed by the Contract of Purchase and Sale and the Vendor/Builder Agreement.

The following language is also to be found in page 8 of the Perkins decision:

Responsibility and fault are, however, two very distinct concepts.

The Tribunal adopts the last stated concept or finding, and is disposed in the present case to reiterate its belief that this assertion is very true, namely, that "responsibility and fault" are two different and distinct concepts. Responsibility lies with the builder by virtue of the obligations of the builder under the statute. In the present case, the Tribunal makes no finding as to fault.

Notwithstanding that the builder may or may not be at fault, the Tribunal is bound to hold that the builder has a responsibility in this case to indemnify the Warranty Program for its outlay.

Therefore, by virtue of the authority vested in it under Section 9(4) of the Ontario New Home Warranties Plan Act, the Registrar is directed to carry out the proposal to revoke the registration of the applicant under the Plan unless before the 1st day of June, 1986, the applicant shall have reimbursed the Program the full sum of \$5,923.00. *

* Note: The above decision was appealed to the Supreme Court of Ontario (Divisional Court) by Abcon Limited. The appeal had not been concluded at the time of this publication.

ERNST U. BOEHLAU

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: STEPHANIE J. WYCHOWANEC, Q.C., CHAIRMAN, PRESIDING
HELEN J. MORNINGSTAR, MEMBER
LOUIS A. RICE, MEMBER

APPEARANCES:

ERNST U. BOEHLAU, appearing on his own behalf

CAROL STREET, representing the
Ontario New Home Warranty Program

DATE OF

HEARING: 29 April 1986

Toronto

REASONS FOR DECISION AND ORDER

The Applicant, Ernst Boehlau, appeals the Decision of the Ontario New Home Warranty Program dated January 30, 1986, disallowing a claim made under Section 14(1)(a) of the Ontario New Home Warranties Plan Act for a refund of a deposit.

This subsection reads in part as follows:

Where,

- (a) a person who has entered into a contract with a vendor for the provision of a home has a cause of action in damages against the vendor for financial loss resulting from the bankruptcy of the vendor or the vendor's failure to perform the contract;

. . . .

the person...is entitled to be paid out of the guarantee fund the amount of such damage subject to such limits as are fixed by the regulations.

The reason given on behalf of the Program for disallowing the claim was that Mr. Boehlau, having reached a settlement with the vendor and having signed a Release, did not have a cause of action for damages against the vendor as required by the Act. In his claim, Mr. Boehlau had stated that he "was forced under duress (Supreme Court of Ontario No. 19906/84) to settle for \$16,000."

No witnesses were called by either party. A Statement of Agreed Facts was filed at the commencement of the hearing as were two other documents containing, primarily, copies of relevant correspondence.

Very briefly, the events leading up to the claim were as follows:

- Mr. Boehlau entered into an Agreement of Purchase and Sale with Coolmur Properties Limited on June 15, 1981, for the purchase of a condominium unit in Toronto and paid \$20,000 as a deposit;
- the original closing date was postponed and by agreement was extended to January 31, 1983. The transaction did not close on that date and apparently neither party tendered upon the other;
- by letter dated March 17, 1983, the solicitor for Mr. Boehlau, then Mr. Gary Braund, demanded the return of the \$20,000 deposit from the vendor, Coolmur, stating that "the premises were not fit for habitation or occupancy in any way";
- the vendor's solicitors responded in May, 1983 that it was the vendor's position that Mr. Boehlau was in default of the Agreement of Purchase and Sale by refusing to close and that the deposit was therefore forfeit;

- some six months later, a new solicitor retained by Mr. Boehlau again requested the return of the \$20,000 deposit from the vendor, together with accrued interest. By letter dated January 16, 1984, this claim was reduced to \$20,000;
- the offer to settle for \$20,000 was refused and by letter dated January 25, 1984, the vendor proposed to settle for a payment of \$12,000 and the execution of a release and agreement as to confidentiality;
- Mr. Boehlau's solicitor responded by letter dated February 3, 1984, in part, as follows:

We acknowledge receipt of your letter dated January 25, 1984 and have discussed the contents thereof with our client. Our client has instructed us to offer to settle the matter upon payment of the sum of \$16,000 all inclusive;

- a copy of this letter was sent to Mr. Boehlau;
- this proposal was accepted by the vendor's solicitor by letter dated February 10, 1984;
- when Mr. Boehlau subsequently refused to accept the \$16,000 and to sign the release and undertaking requested, the vendor's solicitor issued a writ of summons for a declaration that the settlement made between the parties was a valid and binding settlement between them. The summons was dated July 23, 1984;
- by letter dated July 27, 1984, the third solicitor retained by Mr. Boehlau confirmed that the payment of \$16,000 by the vendor would be in full settlement of any claim by Mr. Boehlau;
- upon payment of this amount, Mr. Boehlau signed the following Release on July 17, 1984:

RELEASE

KNOW ALL MEN BY THESE PRESENTS THAT I, ERNST-ULRICH BOEHLAU, in consideration of payment to me of the sum of SIXTEEN THOUSAND (\$16,000.00) DOLLARS and other good and valuable consideration, the receipt of which is hereby acknowledged, do hereby remise, release and forever discharge COOLMUR PROPERTIES LIMITED, its successors and assigns, from all matters of action, causes of action, suits, debts, dues, accounts, bonds, covenants, contracts, claims and demands whatsoever which against it I ever had, now have or which my heirs, executors, administrators, successors and assigns, or any of them hereafter can, shall or may have for or by reason of any cause, matter or thing arising with regard to all matters of every description and kind to date and without limiting the generality of the foregoing, all matters in issue between the parties arising out of an Agreement of Purchase and Sale dated June 15, 1981 and subsequently amended, I was named as Purchaser and COOLMUR PROPERTIES LIMITED was named as Vendor of Suite 613 (amended to be Suite 611), 71 Front Street East, in the City of Toronto in the Municipality of Metropolitan Toronto.

PAYMENT of the above amount will not be treated as an admission of liability by COOLMUR PROPERTIES LIMITED with respect to any of these matters.

AND for said consideration I covenant and agree not to make any claim or take any proceedings against any other person, firm or corporation for contribution or indemnity at law or in equity in respect to the matters herein released.

- the claim for the remaining \$4,000 plus interest on the amount of \$20,000 which had accrued since 1982 was filed by Mr. Boehlau on or about January 17, 1986.

For the Applicant to succeed, he must satisfy this Tribunal that he has a cause of action resulting from the vendor's failure to perform the contract.

On the facts before it, the Tribunal finds that sometime between January 25, 1984 when the offer to settle for \$12,000 was made by the vendor's solicitor and February 3, 1984, when Mr. Boehlau's solicitor counter offered to settle for \$16,000 Mr. Boehlau had made a decision to settle for not less than \$16,000. Mr. Boehlau initially told the Tribunal that he had not instructed his solicitor to make this offer of settlement. (If indeed his solicitor acted without his consent or went beyond his instructions, and the Tribunal makes no finding on this issue, Mr. Boehlau's recourse is not to the Program or to this Tribunal, but elsewhere). However, later in the hearing, Mr. Boehlau informed the Tribunal that he told his solicitor not to settle "for less than \$16,000". A similar statement appears in a copy of a letter to the vendor's solicitor dated July 24, 1984 on the letterhead of Mr. Boehlau, found in Exhibit 3. There Mr. Boehlau states: "I have to confirm 1. I never intended to settle for less than \$16,000. - of the deposit (downpayment)."

However, after the offer to settle for this amount was accepted, Mr. Boehlau heard that other purchasers, who had been in the same position as he was, had been successful in obtaining the full refund of their deposit from the vendor, he changed his mind about accepting the \$16,000 in full settlement. By that time it was too late to do so. Therefore, in retrospect as things turned out, his earlier decision to accept \$16,000, which in the Tribunal's opinion was not made under duress, was probably a poor decision, but it was his decision to make. The Tribunal agrees with the Program that in making this decision, and finally signing the Release, he forfeited his rights to compensation under the Act because he no longer has a cause of action in damages against the vendor.

In the opinion of the Tribunal, Mr. Boehlau has failed to prove his claim to the Tribunal's satisfaction. The Program's decision is therefore upheld.

Accordingly by virtue of the authority vested in it under Section 16(3) of the Ontario New Home Warranties Plan Act, the Tribunal directs the Ontario New Home Warranty Program to disallow the claim.

DOMENIC CAFERRI

APPEAL FROM THE DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: STEPHANIE J. WYCHOWANEC, Q.C., CHAIRMAN, PRESIDING
HELEN J. MORNINGSTAR, MEMBER
D. H. MacFARLANE, MEMBER

APPEARANCES:

JOSEPH PICCININNO, as Agent

CAROL STREET, representing the
Ontario New Home Warranty Program

DATE OF

HEARING: 11 July 1986

Toronto

REASONS FOR DECISION AND ORDER

The Applicants, Mr. and Mrs. Domenic Caferrri, have claimed against the Ontario New Home Warranties Program because parts of the basement floor of their home have settled. The gap between the floor and the wall varies from about 3/4 of an inch to 2 1/2 inches. There is a dip in the floor itself and a crack which runs from east to west for about twenty-two feet.

The Program denied the claim on the basis that the settlement of the basement floor did not constitute a major structural defect as defined in the Regulations. The evidence before this Tribunal is that there are no cracks on the exterior walls of the house which would indicate that there has been a shifting in the footings or any other damage which affects the load-bearing portions of the wall or pillars. Therefore, while there may have been a defect in workmanship, it is not such as to affect the load-bearing portion of the house.

The evidence shows that the basement is being used by the owners and there is no danger in so doing. We therefore find that the use of the whole building, including the basement, has not been so adversely affected by the settlement of the basement floor, that it cannot be used.

The Tribunal, however sympathetic it may be to the claimants, is bound by the narrow provisions of the Act and, although we were concerned at the cost to the Caferri to make the necessary repairs, we have no option in the circumstances of this case but to disallow the claim.

Accordingly, by virtue of the authority vested in it under Section 16(3) of the Ontario New Home Warranties Plan Act, the Tribunal directs the Ontario New Home Warranty Program to disallow the claim.

MR. AND MRS. EDWARD DEICHSEL

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: STEPHANIE J. WYCHOWANEC Q.C., CHAIRMAN, PRESIDING
KENNETH VAN HAMME, MEMBER
JOHN CORSI, MEMBER

APPEARANCES:

EDWARD AND KRISTINA DEICHSEL
appearing on their own behalf

CAROL STREET, representing the
Ontario New Home Warranty Program

DATE OF

HEARING: 16 September 1986

Toronto

REASONS FOR DECISION AND ORDER

This is an appeal from a Decision of the Ontario New Home Warranty Program dated June 2nd, 1986. The Applicants' claim before this Tribunal is for an alleged defect in workmanship or materials resulting in many cracks in the basement floor of their home.

Section 13 of the Ontario New Home Warranties Plan Act describes the warranty which is provided by this statute. As has been noted by this Tribunal many times before, the warranty is fairly complete during the first year although even it does not cover normal shrinkage in materials caused by drying after construction. However, during the next following four years, the warranty is confined to what has been called a "major structural defect".

Since the Deichsel claim was made beyond one year of the warranty, in order to succeed, it was incumbent upon the Applicants to demonstrate that the claim was in fact based upon the existence of a major structural defect as defined in the Regulation to the Act. Specifically it was incumbent upon Mr. and Mrs. Deichsel to demonstrate that the defect in workmanship or materials resulted either in the failure in the load bearing portion of the house or which materially and adversely affected the use of the whole house. In other words, under the Act, the Deichsels would have to satisfy the Tribunal that their house was in danger virtually of falling down or was totally unfit to be used as a residence.

Mrs. Deichsel informed the Tribunal that although there were a few cracks in the basement floor in the first year, she took no action to report them to the builder or to the Program, being under the impression that the full warranty was in effect for the full five years. She said that more cracks have appeared during the interim and that she is concerned about the effect of these cracks and possible new ones in the future. Mrs. Deichsel said that the basement is in full use now. She estimated that the cost to replace the floor would be in excess of \$2,500.00 but that the Deichsels would be prepared to accept that amount for full compensation.

Mr. Todd, an inspector, appearing for the Program confirmed that there were many cracks in the floor but he said that this was not abnormal. It was his evidence that most of the cracks were hairline although in several places a business card could be inserted. He did not see any evidence of water penetration or deflection in the floor. He attributed the cracks to normal shrinkage and possibly some slight settlement. It was his opinion that the cracks do not affect the load bearing portion of the building or the load bearing function. His evidence was not disputed except that it was Mrs. Deichsel's opinion that at the widest point of the cracks, two 25 cent coins could be inserted. There were no photographs tendered to show the cracks.

Upon the evidence before it, the Tribunal finds that while there may be a defect in workmanship or materials, there has been no failure of any load bearing portion of the building, nor has its load bearing function been materially and adversely affected. Neither do the cracks in the basement floor come within the definition or the meaning of "major cracks in basement walls".

The Tribunal also finds that these cracks do not materially and adversely affect the use of the home for the purpose for which it was intended, namely residential occupancy in the normal course. The Tribunal understands the feelings of Mr. and Mrs. Deichsel and their evident concern about the flaws in their home. But however sympathetic the Tribunal may be with the Applicants, as it tried to explain to them at the outset, it must render its decision in accordance with the provisions of the Act and Regulations and under these provisions, the Applicants' claim must fail.

Accordingly, by virtue of the authority vested in it under Section 16(3) of the Ontario New Home Warranties Plan Act, the Tribunal directs the Program to disallow the claim.

MR. AND MRS. R.T. DOSHI

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: STEPHANIE J. WYCHOWANEC, Q.C., CHAIRMAN, PRESIDING
MARY G. CRITELLI, MEMBER
D.H. MACFARLANE, MEMBER

APPEARANCES:

R.T. DOSHI, appearing on his own behalf

CAROL STREET, representing the
Ontario New Home Warranty Program

DATE OF

HEARING: 18 April 1986

Toronto

REASONS FOR DECISION AND ORDER

This is an appeal from a decision of the Ontario New Home Warranty Program dated April 9th, 1985, wherein the Program concluded that two hairline cracks in the concrete basement foundation wall of the Applicant's home although allowing water penetration did not affect the load-bearing capabilities of the wall and consequently could not be considered as constituting a major structural defect as defined in the Regulations to the Ontario New Home Warranties Plan Act.

Since the claim was made beyond one year, in order to succeed, the Applicant must show that the defects are major structural defects. The definition is contained in Ontario Regulation 726, section 1, clause (o).

The evidence shows that the cracks in the north and south foundation walls are long. In the case of the north wall, running from the floor to the basement window. This crack is evident both inside the house and above ground on the outside. The crack on the south wall appears to run from the floor heading towards the beam pocket. The width was described by Mr. Doshi as wider than three or four business cards together, and by Mr. Thurston, the witness called by the Program, as less than the width of one plastic business card.

According to the evidence, Mr. Thurston attempted to insert a business card at the widest point in the cracks but could not do so. Mr. Thurston also testified that there has been no deflection in either the foundation walls or the brick veneer on the upper stories. Pictures taken by both Mr. Doshi and Mr. Thurston and entered as exhibits in this case, indicate that there has been water seepage through these cracks. Mr. Doshi testified, however, that the basement is used, as is the rest of the house.

In her summation, counsel for the Program directed the Tribunal to two earlier decisions, both of which dealt with foundation cracks. Although the Tribunal is not bound by the earlier decisions, and it must decide each case on its own facts, the decisions in the Mundi case and in the Morash case were helpful in its deliberations.

On the evidence before it, the Tribunal finds that there has been no failure in any load-bearing portion of the building, nor has its load-bearing function been materially and adversely affected. The cracks do not come within the inclusion of "major cracks in basement walls". The evidence shows that even though the cracks are lengthy, they are fine. The fact that water seeps through the cracks does not indicate a major crack.

The Tribunal also finds that seepage of the water through the cracks is not such as to materially and adversely affect the use of the whole home or even of the basement. The Tribunal is in sympathy with the Applicants but under the Act and the Regulations in accordance with which the Tribunal must render its decision, this claim cannot succeed.

Accordingly the appeal fails and by virtue of the authority vested in it under section 16(3) of the Ontario New Home Warranties Plan Act, the Tribunal directs the Ontario New Home Warranty Program to disallow the claim.

MR. AND MRS. D. G. DRAPER

APPEAL FROM THE DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: MARY G. CRITELLI, VICE-CHAIRMAN, PRESIDING
DR. STUART E. ROSENBERG, MEMBER
D. H. MacFARLANE, MEMBER

APPEARANCES:

MR. AND MRS. D. G. DRAPER
appearing on their own behalf

CAROL STREET, representing the
Ontario New Home Warranty Program

DATE OF

HEARING: 3 July 1986

Toronto

REASONS FOR DECISION AND ORDER

This is a hearing pursuant to Section 16(3) of the Ontario New Home Warranties Plan Act. The Applicants' claim to the Ontario New Home Warranty Program was made in the fifth year of occupancy of their home. Accordingly, they can only succeed in their claim if they satisfy this Tribunal that they have suffered damages because of a major structural defect as that term is defined in the Regulations, particularly Regulation 726, section 1, subsection (o).

The Applicants' complaint relates to a condition that is commonly known as roof truss uplift. This condition appeared in their home during the third year of occupancy. There has occurred on the upper floor of the Applicants' home, a separation of the drywall ceiling and the partition walls. The degree of separation varies with the seasons of the year and it is at its worst during the winter months when, as the Applicants' evidence indicates, the separation reaches 3/4 of an inch at the worst location. The separation is not occurring at the exterior perimeter walls but is confined to the partition walls, particularly those near the centre partition of the house, including the upstairs foyer and the southwest bedroom. The total combined length of these separation cracks is approximately twelve feet.

It was the evidence of Mr. Thurston, an inspector with the Ontario New Home Warranty Program, and this Tribunal accepts his evidence, that the likely cause of the roof truss uplift condition is the lengthening of the top cords of the roof truss as a result of moisture absorption in the winter months. The bottom cords, which are covered by insulation, do not absorb moisture at the same rate, and tend to stay the same length. The result is that the whole truss tends to arch upwardly thus separating from the partition walls.

Mr. Draper's evidence indicated that his major complaint is that these separation cracks are unsightly and would deter a prospective purchaser if not repaired. He testified that the Applicants' use of their home has not been affected.

While the Tribunal sympathizes with the Applicants' complaint, it is restricted to the definition of major structural defect that is set out in the Regulations. While the roof truss is a load-bearing portion of the building, there is no evidence before the Tribunal to satisfy it that a failure of the roof truss has occurred or that there has been any adverse effect on its load-bearing function. Nor is there any evidence to show that the use of the building has been adversely affected. Neither does the condition described in the evidence amount to a serious distortion of the roof structure. The condition is primarily an aesthetic defect and does not comprise a major structural defect.

Accordingly, the Tribunal directs the Ontario New Home Warranty Program to disallow the claim.

ANTONIO MULAS, operating as
DYNASTY CONSTRUCTION

APPEAL FROM THE PROPOSAL OF THE REGISTRAR
UNDER THE ONTARIO NEW HOME WARRANTIES PLAN ACT

TO REFUSE TO RENEW REGISTRATION

TRIBUNAL: MARY CRITELLI, VICE-CHAIRMAN, PRESIDING
DR. STUART E. ROSENBERG, MEMBER
LOUIS A. RICE, MEMBER

APPEARANCES:
CAROL STREET, representing the
Ontario New Home Warranty Program

No one appearing for the Applicant

DATE OF
HEARING: 21 July 1986 Toronto

REASONS FOR DECISION AND ORDER

This is a hearing pursuant to Section 9(2) of the Ontario New Home Warranties Plan Act to review the Proposal of the Registrar under Section 9(1) of that Act to refuse to renew the registration of Antonio Mulas operating as Dynasty Construction.

The reasons for the Proposal given by the Registrar are set out in the Notice of Proposal which forms part of Exhibit 3 as follows:

1) Pursuant to the provisions of Section 8(2) of the Ontario New Home Warranties Plan Act, R.S.O. 1980, Chapter 350 (the 'Act'), the Registrar, having regard to your financial position, finds you cannot reasonably be expected to be financially responsible for the conduct of your undertakings as required by the provisions of Section 7(1)(a) of the Act, TO WIT:

(a) You have failed to provide a financial statement or in the alternative a personal net worth statement of the principal of the

company requested of you by letters dated January 14th, 1986 and February 7th, 1986 and thereby have failed to provide sufficient evidence of financial ability as required by the Registrar.

2) Pursuant to the provisions of Section 8(2) of the Act, you are in breach of a condition of registration, TO WIT:

(a) You have failed to comply with subsections 5 and 6 of Regulation 728 requiring you to furnish such documentation, as the Registrar may require and request, and which were requested in accordance with the letters referred to in paragraph 1(a) above.

Subsequent to the issuance of the Notice of Proposal, the builder supplied a financial statement to the Program and this was reviewed by the Director of Registration and Enrolments, Mr. Johnson, who gave evidence before the Tribunal today. He indicated that, after reviewing the statement, he concluded that, based on the number of homes to be constructed the company was insufficiently capitalized to proceed as planned.

Mr. Johnson wrote to the builder by letter dated July 1, 1986 and this letter is part of Exhibit 3 as well, at Tab 10 and in that letter he stated in part as follows:

Due to the number of houses you presently have in inventory (eleven) and the number of homes proposed for future construction (five), we find the financial statements insufficient to substantiate these numbers. Therefore, we once again request an up to date notarized statement of personal net worth in order that we may satisfy ourselves that there is sufficient financial strenght (sic) to support the level of construction anticipated, as well as, the homes currently under construction. As this requirement forms part of the notice of proposal which was issued on March 14th, 1986, if the same is

not provided prior to the hearing, we are prepared to proceed as originally intended.

The Tribunal has heard evidence that, since that letter was sent, there has not been any further evidence received from the builder as to his financial ability and, in particular, no personal net worth statement has been provided.

The builder had requested this hearing, however he has not appeared today although he was duly served with a Notice of the Hearing and the hearing proceeded in his absence pursuant to the authority given to this Tribunal under the Statutory Powers Procedure Act. The Tribunal finds that the Registrar has acted properly in refusing to renew the registration for the reasons set out in the Notice of Proposal and the Tribunal therefore directs the Registrar to carry out his Proposal.

KENNETH EARLEY

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: STEPHANIE J. WYCHOWANEC Q.C., CHAIRMAN, PRESIDING
KENNETH VAN HAMME, MEMBER
D. H. MacFARLANE, MEMBER

APPEARANCES:

KENNETH EARLEY, appearing on his own behalf

CAROL STREET, representing the
Ontario New Home Warranty Program

DATE OF

HEARING: 27 March 1986

Toronto

REASONS FOR DECISION AND ORDER

The Applicant, Kenneth Earley, appeals the Decision, dated September 3, 1985, of the Ontario New Home Warranty Program, wherein it disallowed a claim for a major structural defect in relation to a house owned by the Applicant.

It is common ground that the defects complained of by the Applicant were not brought to the attention of the Program within the one year period under which the Ontario New Home Warranties Plan Act takes effect. It appears that there was some confusion as to the commencement date of the warranty and Mr. Earley, therefore, missed the one year cut off date by some few days. The application, therefore, is brought under the provisions of section 14(1)(c) of the Act.

A "major structural defect" is defined in the regulations in the following terms:

(o) "major structural defect" means for the purposes of clause 13(1)(b) of the Act, any defect in workmanship or materials,

(i) that results in failure of the load-bearing portion of any building or materially or adversely affects its load-bearing function, or

- (ii) that materially and adversely affects the use of such building for the purpose for which it was intended,

including significant damage due to soil movement, major cracks in basement walls, collapse or serious distortion of joints or roof structure and chemical failure of materials, but excluding flood damage, dampness not arising from failure of a load-bearing portion of the building, damage to drains or services, damage to finishes and damages arising from acts of God, acts of the owners and their tenants, licensees and invitees, acts of civil and military authorities, acts of war, riot, insurrection or civil commotion and malicious damage.

Very briefly, the complaints of the Applicant relate to cracks in the foundation walls of the house which have allowed water to penetrate into the basement, cracks in the mortar joints on each front corner of the garage between the quoin corner and the wall, and cracks in the mortar in the fireplace.

The Applicant appeared on his own behalf and called no witnesses. He did provide the Tribunal with numerous photographs which he took of the house to show the defects complained of. The photographs graphically showed the water damage in the basement resulting from the foundation cracks and the generally shoddy workmanship in the outside brick work and fireplace construction. The photographs taken by Mr. Thurston, an inspector with the Program, which were also filed with the Tribunal, showed the same defects.

The water damage in the basement clearly would affect the use and enjoyment of that part of the house by the owner. The poor workmanship on the outside brick work and the fireplace would also undoubtedly be a constant source of irritation to anyone who took pride in his home.

Originally, Mr. Earley only notified the Program of a foundation crack in the south basement wall of the cold cellar and the cracks in the hearth. Although, as earlier stated, this notification was outside the one year warranty period, the Program agreed to repair the crack in the cold

cellar. As well, the Program has agreed to repair the crack on the east foundation wall which was located to the right of the hydroelectric panel and was thought to pose a safety hazard. The Program refused the claims related to the remaining defects on the basis that they did not constitute a major structural defect as defined in the Act and regulations thereto.

It should be pointed out first of all that the premises in question have been inspected by the Program three times: on November 27, 1984; August 12, 1985; and March 10, 1986. The inspections were carried out by Mr. Thurston who was the only witness called on behalf of the Program.

The crack on the west wall was inspected twice. It was described by Mr. Thurston as running from the window to the floor and being hairline in width. On the second inspection, there was substantial water leakage with water running across the floor. However, Mr. Thurston could not see any variation in the crack between the two inspections, nor could he see any movement in the wall. He attributed the crack to the normal drying out process. In his expert opinion, there was no failure of the load-bearing portion of this wall and he, therefore, did not think that the crack could be considered a major structural defect.

Exhibits 6, 15F, 15G and 16G clearly show the water damage to the wall and the flooding on the floor of the basement. Until the repairs to this crack are made, this area of the house will undoubtedly have limited use. In her submission, Miss Street referred the Tribunal to two earlier decisions. The following sentence in the Kennedy decision, 1982, 11 CRAT at page 110 deserves repeating: "A major structural defect in our view and as we have found in the past must inter alia be one which renders a home virtually uninhabitable, uncomfortable beyond reason, unsafe or in a state of imminent collapse". On the evidence before it, the Tribunal cannot find that the load-bearing portion of the house is adversely affected as the result of the crack on the west wall or that the crack materially and adversely affects the use of the whole building as a residence. It, therefore, must confirm the disallowance of this part of the Applicant's claim.

The second matter in dispute, relating to the outside brick veneer of the house, are the cracks in the mortar running about 6 feet in length from the top of the garage door upwards to the roof overhang. These two cracks

appearing at the junction of the quoin and the regular wall are wider than a business card. In some places, the mortar is actually falling out.

Mr. Thurston noted that all the walls of the house are brick veneer and consequently bear no weight. He testified that he could not see any movement or deflection in the wall where the cracks appeared. He could not tell the Tribunal if the bricks forming the quoin were tied with metal ties to the rest of the wall because the ties would not normally show, but he thought they were in place because he had not seen further deterioration between visits to the house. In his view, these cracks occurred because of normal drying out and he did not consider the cracks as constituting a major structural defect.

While the method used by the builder to construct the quoin is cosmetically unattractive and probably contributed to the cracking, it is an acceptable method. The Tribunal has found in the past and does so now, that the cracking of brick veneer no matter how unsightly from an aesthetic point of view does not meet the criteria of a major structural defect and it, therefore, agrees with the Program's decision to disallow this portion of the Applicant's claim.

The last matter in dispute related to the construction of the fireplace. Mr. Earley advised the Program of cracks in the mortar in the hearth at the same time that he informed it about the cracks in the cold cellar - that is a few days after the first year warranty expired. However, for some reason, no inspection was made of the hearth during the first visit. Mr. Earley testified that during the first year, the cracks in the hearth had been repaired twice by the builder. Some time later, well beyond the first year of possession, Mr. Earley examined the construction of the fireplace from underneath and saw what can, at the very least, be described as careless or sloppy construction. According to Mr. Earley, a building inspector from the municipality called it a "poor job", but not a safety hazard.

By the time Mr. Thurston inspected the fireplace, a 300 - 400 pound insert had been placed in the fireplace. Mr. Thurston agreed that the construction of the concrete slab supporting the hearth was not well done but noted that there were no cracks in it. He did not think that it posed a safety hazard. In any event, the slab did not affect the

load-bearing portion of the house. He thought that the heavy insert in the fireplace may have contributed to the continued cracking of the mortar in the hearth, and since the claim was made beyond the first year, the defects did not fall within the meaning of a major structural defect. The Tribunal accepts this assessment, and the claim with respect to this item must also fail.

This Tribunal's jurisdiction does not extend to require the Program to reprimand builders on their careless construction practices, such as those described in this hearing. Nevertheless, the Tribunal feels obliged to say that if it did have such jurisdiction, it certainly would have exercised it. Given the present legislation, and although it is in sympathy with the Applicant, the Tribunal finds that it must disallow his claim.

Therefore by virtue of the authority vested in it under section 16(3) of the Ontario New Home Warranties Plan Act, the Tribunal directs the Ontario New Home Warranty Program to disallow the claim.

FIESTA CONSTRUCTION LTD.

APPEAL FROM THE PROPOSAL OF THE REGISTRAR
UNDER THE ONTARIO NEW HOME WARRANTIES PLAN ACT
TO REFUSE TO RENEW REGISTRATION

TRIBUNAL: STEPHANIE J. WYCHOWANEC, Q.C., CHAIRMAN, PRESIDING
HELEN J. MORNINGSTAR, MEMBER
ALBERT LONGO, MEMBER

APPEARANCES:

CAROL STREET, representing the
Ontario New Home Warranty Program

No one appearing for the Applicant

DATE OF
HEARING: 29 July 1986

Toronto

REASONS FOR DECISION AND ORDER

The Applicant, Fiesta Construction Inc., had requested a hearing after receiving a Notice of Proposal dated April 8th, 1986 under Section 8(2) of the Ontario New Home Warranties Plan Act from the Registrar of the Program to refuse to renew its registration under the Plan. A Notice of Amended Proposal was issued by the Registrar on July 27th, 1986, and the Tribunal is proceeding on the basis that the Applicant is appealing from that Proposal as well.

No one appeared on behalf of the Applicant. At the commencement of the hearing, counsel for the Program advised the Tribunal that she had spoken with Mr. Yack, the solicitor for the Applicant, who informed her that no one would be appearing on behalf of Fiesta and requesting through her an adjournment. The adjournment was objected to by the Program. The Tribunal noted that the hearing date today was peremptory and denied the adjournment. It thereupon proceeded with the hearing in the absence of the Applicant.

The issue between the parties was the failure of the Applicant, Fiesta, to rectify the very serious defects and deficiencies in accordance with a number of Conciliation Reports rendered by the Program over a period of a number of months beginning in December 1985. The latest Conciliation Report appears to be in June 1986.

The Applicant had been advised of these complaints by new homeowners and was informed of the inspection date. The Applicant was notified of the repairs required to be made, but has not responded in any way. The Warranty Program in some cases already had the repairs made or cash settlements paid, and in others is in the process of arranging to have the repairs made. The total cost to the Program for all repairs, plus excess conciliation fees, will be in the neighbourhood of some \$27,000.00. None of the monies already expended by the Program has been paid by the Applicant.

The Tribunal finds on the evidence that the Warranty Program has made reasonable efforts to advise the Applicant of its position and that the Program's letters to the Applicant were both received and ignored. The Tribunal finds that the steps taken by the Program to remedy the defects and deficiencies complained of were reasonable and justified in the circumstances. The Tribunal, absent any evidence to the contrary, also finds that the Warranty Program is justified in looking to the Applicant for repayment to the Plan of the present and future monies owing in respect of the repairs made and fees for the excess Conciliation Reports.

Therefore by virtue of the authority vested in it under Section 9(4) of the Ontario New Home Warranties Plan Act, the Tribunal directs the Registrar to carry out his Proposal to refuse to renew the registration of Fiesta Construction.

B. GODDEN

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW THE CLAIM

TRIBUNAL: STEPHANIE J. WYCHOWANEC, Q.C., CHAIRMAN, PRESIDING
HELEN J. MORNINGSTAR, MEMBER
ALBERT LONGO, MEMBER

APPEARANCES:

CAROL STREET, representing the
Ontario New Home Warranty Program

No one appearing for the Applicant

DATE OF

HEARING: 29 July 1986

Toronto

DECISION AND ORDER

The Tribunal determines as follows:

1. By Notice of Adjournment (Exhibit 3) dated the 8th day of July, 1986, the Tribunal on its own motion adjourned the hearing scheduled for July 7th to the 29th day of July, 1986;

2. The Applicant having been given Notice of the Appointment for Hearing for the 7th day of July, 1986 as evidenced by Exhibit 2 which contained the further Notice

"...if you do not attend at the hearing
the Commercial Registration Appeal Tribunal
may proceed in your absence and you will not
be entitled to any further notice in the
proceedings."

3. The Applicant has not appeared.

4. No evidence has been placed before the Tribunal in respect of the claim.

Accordingly by virtue of the authority vested in it under Section 16(3) of the Ontario New Home Warranties Plan Act, the Tribunal directs the Ontario New Home Warranty Program to disallow the claim.

S. GOLDBERG

APPEAL FROM THE DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: MARY G. CRITELLI, VICE-CHAIRMAN, PRESIDING
KENNETH VAN HAMME, MEMBER
LOUIS A. RICE, MEMBER

APPEARANCES:

S. GOLDBERG, appearing on her own behalf
CAROL STREET, representing the
Ontario New Home Warranty Program

DATE OF

HEARING: 30 July 1986

Toronto

REASONS FOR DECISION AND ORDER

This has been a hearing pursuant to Section 16(2) of the Ontario New Home Warranties Plan Act to consider a claim made under Section 14 of that Act.

The claimant is the second owner of her home and took possession in the fourth year of the warranty period. Accordingly, in order to succeed in her claim, she must establish to the satisfaction of this Tribunal that she has suffered damages as the result of a major structural defect as that term is defined in the Regulations.

The Proof of Claim filed by the claimant describes two defects. The first is the unevenness of the floors in the living room, dining room and master bedroom. The second is a leak in the basement.

It is clear from the evidence of the claimant and of the witnesses testifying on behalf of the Program that the defects complained of are not major structural defects.

It was admitted by the claimant that the only reason she requested this hearing was because the Program had failed to assist her in finding tradesmen to repair the defects complained of. This Tribunal has no authority to direct the Program to provide such assistance as there is no legal obligation set out in the Act requiring the Tribunal to provide such assistance.

Accordingly by virtue of the authority vested in it under Section 16(3) of the Ontario New Home Warranties Plan Act, the Tribunal directs the Ontario New Home Warranty Program to disallow the claim.

MR. AND MRS. J. GONZALEZ

APPEAL FROM THE DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: MATTHEW SHEARD, Q.C., VICE-CHAIRMAN, PRESIDING
DR. STUART E. ROSENBERG, MEMBER
D.H. MACFARLANE, MEMBER

APPEARANCES:

MR. AND MRS. J. GONZALEZ,
appearing on their own behalf

CAROL STREET, representing the
Ontario New Home Warranty Program

DATE OF
HEARING: 26 June 1986

Toronto

REASONS FOR DECISION AND ORDER

The Applicants, Mr. and Mrs. Jose Gonzalez, appealed from a Decision of the New Home Warranty Program dated January 8th, 1986, refusing their claim which concerned an alleged "major structural defect" consisting of a certain leak-producing crack or cracks in the basement wall of their new home, a new home registered under the Plan.

The reason they had alleged a "major structural defect" was not so much because the problem was "major" rather than "minor" but because the first year of the warranty on their home had expired and there was no other type of claim in respect of their problem they could have made at the time. It seems the reason they were "late" in filing their claim was that they had fully and even repeatedly notified the builder of the situation within the first year and the builder had failed to rectify the problem and had, according to the evidence before us, repeatedly put them off with excuses or delaying tactics until the period of one year, the year first following the commencement of the warranty which is the currency of the broad warranty which would have covered the problem as it was described to us, had expired. During that initial twelve month period when the Applicants were attempting to deal with the builder as stated, they made the mistake of failing to report

the problem in question to the Warranty Program either in writing or otherwise. By the time they had communicated with the Warranty Program, it was too late for them to claim rectification of the leakage problem on the ground of faulty workmanship or on any other ground, save the one ground in respect of which the warranty, frequently called the 5 year warranty, survived the initial one year period, that is to say, the ground of a "major structural defect" as defined.

The Warranty Program rejected the claim basing its decision on the interpretation of the statute and its Regulations which has hereinbefore been applied. In reaction to this, Mr. and Mrs. Gonzalez felt a strong sense of injustice.

The Tribunal notes that on average over the last few years at least 50% of the appeals heard by it have been under the Ontario New Home Warranties Plan Act and the majority of these have related to "major structural defects" brought to the Program's attention during the last four years of the warranty. Of these claims, the majority have been rejected by the Tribunal. Usually this has been because the nature of the claim in a given case has not satisfied the definition of "major structural defect" provided at section 1, clause (o) of Regulation 726 as amended under the Ontario New Home Warranties Plan Act which reads as follows:

(o) "major structural defect" means for the purposes of clause 13(1)(b) of the Act, any defect in workmanship or materials,

- (i) that results in failure of the load-bearing portion of any building or materially or adversely affects its load-bearing function, or
- (ii) that materially and adversely affects the use of such building for the purpose for which it was intended,

including significant damage due to soil movement, major cracks in basement walls, collapse or serious distortion of joints or roof structure and chemical failure of materials, but excluding flood damage, dampness not arising from failure of a

load-bearing portion of the building, damage to drains or services, damage to finishes and damages arising from acts of God, acts of the owners and their tenants, licensees and invitees, acts of civil and military authorities, acts of war, riot, insurrection or civil commotion and malicious damage;

In a line of previous decisions, the Tribunal has held that the words "that materially and adversely affects the use of such building for the purpose for which it was intended" mean the use of the whole of the building and not merely part of it (e.g. the basement) and as well, that the "purpose" for which a residence is intended must be residential occupancy in the normal course. The Tribunal has also held that communication to the builder of a problem, which may or may not be sufficiently grave as to constitute a "major structural defect", during the first year when the warranty is broader, covering defects in workmanship and material or failure to meet the standards of the Ontario Building Code, is not, per se, notice constructive or otherwise to the Warranty Program.

In the case presently before us, the Tribunal cannot escape the feeling that Mr. and Mrs. Gonzalez, who are in many ways typical of scores of Ontario residents, holders of the warranty provided by the Ontario New Home Warranty Program and members of the class which it was designed ostensibly to protect, are the victims of some degree of unfairness.

If this perception is well-founded, the Tribunal is bound to ask: Does the problem arise from some inherent inequity in the statute itself or, alternatively, is it the result of the manner in which the Tribunal has interpreted the statute over the years?

In the present case, the Tribunal believes that natural justice may not be served by the simple application of past precedent.

In considering its decision the Tribunal has had recourse to Section 10 of the Interpretation Act, R.S.O. 1980, Chapter 219, which reads as follows:

10. Every Act shall be deemed to be remedial, whether its immediate purport is to direct the doing of any thing that

the Legislature deems to be for the public good or to prevent or punish the doing of any thing that it deems to be contrary to the public good, and shall accordingly receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act according to its true intent, meaning and spirit.

It is our understanding that the rule of stare decisis does not apply as rigidly (if at all) to the decisions of an administrative tribunal as it does to those of a court of law; although, of course, equity will normally best be served by equality or uniformity. The option to radically vary or actually reverse its own previous position, as established by a line of decisions, is therefore open to the Tribunal which certainly ought not, if it thinks it right, be inhibited from doing so.

The words which seem to offer the most interesting prospect of useful re-examination are to be found at s.1.(o)(ii) of the aforementioned Regulation 726 under the Ontario New Home Warranties Plan Act, viz., "major structural defect" means "...any defect in workmanship or materials...that materially and adversely affects the use of such building for the purpose for which it was intended..."

We refer in particular to the words "that materially and adversely affects the use of such building for the purpose for which it was intended..."

The Tribunal has held in the past that such a defect must so affect the use of the whole of the building, not just a part of it, that it must render the whole building uninhabitable or virtually so. In one case, the owner-occupant of a new home was so overwhelmed by the defect complained of that she was obliged to move out and take quarters in a hotel and put her dogs in a boarding kennel. In another case where there was only one bathroom which had defects which the local public health inspector called dangerous and unsafe for the bathing of the baby, a "major structural defect" was found to exist although such would not have been the case had there been a second bathroom to provide alternative means of bathing the baby.

But is this interpretation necessarily accurate? In the present case, the basement walls (which, of course, are load-bearing and are a load-bearing portion of the building) have a leak due to a crack so that the basement is damp and wet. Can this effect be deemed to materially affect the "use of the building" for its intended purpose in an adverse way?

In its past decisions, the Tribunal has interpreted the word "use" in a unitary sense, by regarding a building constructed as a domicile to possess only a single use, i.e., habitation. We now ask the question: Can "use" also mean "uses," i.e., may a house be "usable" in one or in many of its parts, but not "usable" as a whole? In this case, the Tribunal is disposed to say "yes".

Therefore the Tribunal has decided to allow this claim for the reasons stated.

By virtue of the authority vested in it under Section 16(3) of the Ontario New Home Warranties Plan Act, the Tribunal directs the Ontario New Home Warranty Program to allow the claim and to rectify the problems complained of which the Tribunal deems to be a "major structural defect" forthwith.

MR. AND MRS. C. LUSTHOUSE

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: MARY G. CRITELLI, VICE-CHAIRMAN, PRESIDING
DR. STUART E. ROSENBERG, MEMBER
D.H. MACFARLANE, MEMBER

APPEARANCES:

MICHAEL TITLE, representing the
Ontario New Home Warranty Program

No one appearing for the Applicants

DATE OF

HEARING: 24 June 1986

Toronto

REASONS FOR DECISION AND ORDER

It is now 10:05 a.m. and the Applicants have not appeared.

Section 7 of the Statutory Powers Procedure Act provides that:

Where notice of a hearing has been given to a party to any proceedings in accordance with this Act and the party does not attend at the hearing, the tribunal may proceed in his absence and he is not entitled to any further notice in the proceedings.

The claimants were properly served with the Appointment for and Notice of Adjourned Hearing as may be seen by Exhibit 5, which is the Affidavit of Service sworn the 19th of June, 1986.

As the claimants have not appeared, no evidence has been placed before the Tribunal in support of their claim. Under the circumstances, it is unnecessary to hear from the Corporation. There being no evidence to support the claim before the Tribunal, the Tribunal directs the Program to disallow the claim pursuant to the authority vested in it under Section 7 of the Statutory Powers Procedure Act and Section 16(3) of the Ontario New Home Warranties Plan Act.

MEADOWHILL HOMES LIMITED

APPEAL FROM A PROPOSAL OF THE REGISTRAR UNDER THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO REVOKE THE REGISTRATION

TRIBUNAL STEPHANIE J. WYCHOWANEC, Q.C., CHAIRMAN, PRESIDING
HELEN J. MORNINGSTAR, MEMBER
D.H. MacFARLANE, MEMBER

APPEARANCES:
MICHAEL TITLE, representing the Registrar under
the Ontario New Home Warranties Plan Act

No one appearing on behalf of the Applicant

DATE OF
HEARING: 17 April 1986

Toronto

REASONS FOR DECISION AND ORDER

The Applicant, Meadowhill Homes Limited, had requested a hearing after receiving a Notice of Proposal dated October 21, 1985, under section 9 of the Ontario New Home Warranties Plan Act from the Registrar of the Program to revoke its registration under the Plan.

No one appeared on behalf of the Applicant at the opening of the proceedings which were delayed for fifteen minutes and thereafter recessed for another fifteen minutes. The Tribunal being satisfied that the Notice of Hearing had been properly served on the Applicant and on William Moskalyk, an officer of the company, thereupon proceeded with the hearing in the absence of the Applicant.

The issue between the parties was the failure of the Applicant to rectify defects and deficiencies in accordance with a Conciliation Report rendered by the Program dated March 21, 1985. The Applicant had been advised of a complaint of a new home owner and was informed of the inspection date. No one representing the Applicant appeared at the inspection. The Applicant was notified of the repairs required to be made but did not respond. The Warranty Program subsequently called for tenders and was obliged to pay the owner \$1,310.00 to have the repairs made. An invoice for the repairs, and an administrative fee of the Program, was sent to the Applicant in the amount of \$1,506.50. This amount has not been paid.

The Tribunal finds on the evidence that the Warranty Program had made reasonable efforts to advise the Applicant of its position; that the Program's letters to the Applicant were both received and ignored.

The Tribunal finds that the steps taken by the Program to remedy the problems complained of were reasonable and were justified in the circumstances, and that the sum of \$1,506.50 was reasonably and properly expended. The Tribunal also finds that the Warranty Program is justified in looking to the Applicant for repayment to the Plan of this sum.

Therefore by virtue of the authority vested in it under Section 9(4) of the Ontario New Home Warranties Plan Act, the Tribunal directs the Registrar to carry out his Proposal to revoke the registration of Meadowhill Homes Limited.

J. MUSCAT

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: STEPHANIE J. WYCHOWANEC, Q.C., CHAIRMAN, PRESIDING
HELEN J. MORNINGSTAR, MEMBER
LOUIS A. RICE, MEMBER

APPEARANCES:

J. MUSCAT, appearing on his own behalf

CAROL STREET, representing the
Ontario New Home Warranty Program

DATE OF
HEARING: 14 April 1986

Toronto

REASONS FOR DECISION AND ORDER

This is an appeal from a decision of the Ontario New Home Warranty Program dated May 1, 1985 wherein the Program concluded that the squeaks in the floor and the two minor humps on the first and second floor of the house, owned by the Applicant, were the result of drying out of materials and minor shrinkage of materials and were not considered to be major structural defects as defined in the Regulations.

The evidence before this Tribunal is that in 1982 some remedial work was done with respect to the squeaks in the left rear bedroom floor, front entrance hallway floor and the kitchen entrance floor. These repairs were acknowledged by the Applicant as having been done and a release was signed by him. Subsequently in 1985, a further complaint was made about squeaky floors throughout the first floor of the house and two humps, one at the threshold of the family room and one immediately above, at the threshold of the bedroom.

It was the evidence of one of the inspectors of the Program that there was some loose subflooring on the first floor and loose bridging, but in his opinion neither defect constituted a major structural defect as defined. The humps were described as not being excessive and not causing any safety hazard.

The evidence of the claimant was that there were people living in the home at the present time and the house was being used as a residence.

The Tribunal finds that the squeaks in the floor and the two humps in the floor are caused partly by inadequate nailing of the floor and general shrinkage of materials. The lack of humidity has perhaps contributed to the latter effect; however, the Tribunal cannot find, given the definition of a major structural defect, that the problems complained of constitute a major defect in that they neither affect the load-bearing portion of the building nor materially and adversely affect the use of the building.

Consequently, by virtue of the authority vested in it under Section 16(3) of the Ontario New Home Warranties Plan Act, the Tribunal directs the Ontario New Home Warranty Program to disallow the claim of the Applicant.

NORHOME DEVELOPMENTS INC.

APPEAL FROM A PROPOSAL OF THE REGISTRAR UNDER THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO REFUSE REGISTRATION

TRIBUNAL STEPHANIE J. WYCHOWANEC, Q.C., CHAIRMAN, PRESIDING
KENNETH VAN HAMME, MEMBER
LOUIS A. RICE, MEMBER

APPEARANCES:

GREGORY C. HERTZBERGER, representing the Applicant

CAROL STREET, representing the Registrar under
the Ontario New Home Warranties Plan Act

DATE OF

HEARING: 11 April 1986

Toronto

REASONS FOR DECISION AND ORDER

This is an appeal by Norhome Developments Inc., from a Proposal of the Registrar, Ontario New Home Warranty Program, dated January 26, 1986, wherein he proposed to refuse the Company's application for registration under the Ontario New Home Warranties Plan Act. The Registrar's reasons relate in part to the conduct and capabilities of Norhome itself and in part to the past conduct and capabilities of its President, John R. Newton.

No witnesses were called by either party to this hearing but a Statement of Agreed Facts (Exhibit 7) was filed, as was a document entitled "Appellant's Exhibit Record" (Exhibit 10). According to these exhibits, Mr. Newton was the principal officer of Safari Developments Ltd. Safari was fully registered as a builder under the Plan from April 5, 1977 to April 5, 1980 when its registration expired. The Program was obliged to pay \$38,677.96 for warranted repairs to some 33 houses built and sold by Safari during that period. These monies have never been reimbursed to the Program notwithstanding that indemnification is a term and condition of registration (O.Reg. 728, s.1, para.4).

Given the past history of Safari and Mr. Newton, the Registrar, as a condition of registration of Norhome required:

- a) A cash payment of \$20,000.00 up front. This will be considered as the first instalment of the over \$38,000.00 owed to the Program.
- b) Security in the amount of \$20,000.00 (i.e. \$1,000.00 per unit) based on the number of units proposed for the up coming twelve months. This is security normally required of all registrants who have had a history of claims experience with the Program.
- c) After the first year of registration, fifty percent of the security will be refunded and the remaining fifty percent will be retained and put towards the balance of money due to the Program.
- d) After the first year of registration, the matter will be reviewed and a decision will be made with respect to the remaining \$8,000.00.

As the conditions relating to Safari's indebtedness to the Program were unacceptable to Norhome, the Registrar refused registration citing, with reference to Norhome, lack of financial responsibility, especially the failure to post security and the failure to reimburse the Program for Safari's obligations, and with reference to Mr. Newton, that his past conduct afforded reasonable grounds for belief that Norhome's undertakings would not be carried out in accordance with law and with integrity and honesty. The Registrar also claimed, again given the past record of Safari and Mr. Newton, that there was not sufficient technical competence in the applicant Norhome to perform the warranties.

Under the Ontario New Home Warranties Plan Act, a person is entitled to registration unless any one of the conditions, set out in Section 7(1) of the Act apply. The subsection reads, in part, as follows:

7. (1) An applicant is entitled to registration by the Registrar except where,

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- (c) the applicant is a corporation and,
 - (i) having regard to its financial position, it cannot reasonably be expected to be financially responsible in the conduct of its undertakings, or
 - (ii) the past conduct of its officers or directors affords reasonable grounds for belief that its undertakings will not be carried on in accordance with law and with integrity and honesty; or
- (d) in the case of an application for registration as a builder, the applicant does not have sufficient technical competence to consistently perform the warranties.

To protect the public trust, the legislation requires the Registrar to look behind the corporate veil and it is clear under these provisions that in the case of a corporation, the past conduct of its officers and directors may be taken into account in determining whether to grant registration.

The Tribunal does not know when Norhome was incorporated. However, letters found in Exhibit 10 dated December 17, 1979, and February 20, 1980, indicate that it was in existence then. The letter from HUDAC of February 1980 to Norhome speaks of a \$50,000 bond to be posted on behalf of Norhome as a condition of registration. It also refers to the indebtedness of Safari and states:

If those claims are not settled with the Warranty Program the registration of Safari will be revoked and that in turn will reflect on the application of Norhome, both companies have the same John R. Newton as sole principal.

There is no evidence that Norhome was involved in any builder activity in the intervening period.

The Tribunal was told by counsel for Norhome that Norhome is prepared to post security but not to repay Safari's debt to the Program. Aside from the fact that Norhome has refused to pay Safari's debt, little evidence was provided as to its financial capabilities. An unaudited interim balance sheet found in Exhibit 10 shows retained earnings as of September 30, 1985 of \$37,373. A letter from a bank account manager dated September 30, 1985 states in part as follows:

We presently have established a low 6-figure line of credit for the Company, and we consider Mr. Newton to be a responsible businessman and capable of meeting his commitments.

On the basis of this evidence alone, the Tribunal would have difficulty in concluding that Norhome could not reasonably be expected to be financially responsible in the conduct of its undertakings. However, the past conduct of its officers must also be taken into account.

The principal officer and shareholder of the two companies was and is John R. Newton. It is John R. Newton with whom we are primarily concerned in this decision rather than the corporate veils in which he may appear.

There was no suggestion that Mr. Newton was not the principal officer and directing force of Safari, nor is there any dispute that the Program was obliged to pay some \$38,700 for warranted repairs to houses built by Safari and that this debt has not been repaid. Counsel for Norhome pleaded extenuating circumstances for this state of affairs. The explanation submitted by him was that in mid-October, 1979, the Canadian Imperial Bank of Commerce "took over" Safari and, therefore, neither Safari nor Mr. Newton could complete the houses and necessary repairs or carry out its undertakings or reimburse the Program. He submitted that because they could not act, they should not now be held responsible.

This explanation, in the Tribunal's opinion, overlooks several facts. The "take-over", if it could be categorized as such, only related to houses being constructed in the Terrace Bay, Ontario project. The claims paid by the Program related to houses constructed in several other towns and cities in Northern Ontario.

To fully appreciate the situation, the Program provided a detailed summary of the claims made against the Program arising out of the construction activity of Safari. The summary reveals that of the 33 claims listed, only seven were in connection with houses built in Terrace Bay. Twenty-four claims were made with respect to houses purchased or occupied by the owners prior to October 16 or 19, 1979. In one case, purchase or possession of the house took place on August 15, 1977 with the date of claim, December 8, 1977 and the date of inspection by the Program, October 20, 1978.

The Tribunal also notes, however, that of the 33 claims, only nine were formally made before mid-October 1979. Of the nine houses completed after October 16, 1979, six were in Terrace Bay and, therefore, were likely completed under the terms of agreement outlined in the Bank's letter of October 19, 1979, that is under the direction of a consulting engineer paid by Kimberly-Clark. These six claims account for some \$15,000. The remaining Terrace Bay house where the owner took possession in September 1979 had claims for warranted repairs in excess of \$10,700. Undoubtedly by the fall of 1979, Safari was in severe financial difficulty, and it was not about to spend any of its own funds, if it had any, to make any repairs to houses it had built earlier.

No one argued that there is a legal obligation on either Norhome or Mr. Newton personally to indemnify the Program on behalf of Safari. But, as the Tribunal understands the argument of counsel for the Registrar, the failure to indemnify the Program with respect to the Safari claims shows a lack of integrity on the part of Mr. Newton. As counsel put it, Mr. Newton just "chose to walk away" from the corporate obligations. It is this past conduct of Mr. Newton to which the Registrar points in support of his Proposal.

Counsel for Norhome on the other hand submitted that since there was no legal obligation on the part of Norhome or Mr. Newton to indemnify the Program, then there can be no lack of integrity on the part of Mr. Newton if he chose not to do so.

On the matter of lack of technical competence, again counsel for the Registrar points to the history of claims and argues that Mr. Newton, as the directing force behind Safari must be held responsible for the numerous breaches of warranty that occurred prior to October 16, 1979, and shortly thereafter. In reply, Norhome's counsel submits that the

deficiencies resulting in claims against the Program were for the most part minor in nature and that no builder builds a perfect house. He questioned how, if indeed there is a lack of technical competence, which he denied, the repayment of all or part of the \$38,000 to the Program could overcome this problem.

The Tribunal finds that most of the houses which had warrantable defects were constructed only under the supervision of Safari and Mr. Newton, and that in several cases, Safari and its President had ample time before the bank "take-over" such as it was, to correct any defects in those houses. In other words, in the Tribunal's opinion, the intervention of the Bank in October, 1979, does not provide a blanket excuse to Safari and Mr. Newton for all of the construction deficiencies and for failure to discharge their undertakings to the Program. As earlier noted, Norhome was put on notice in early 1980, that unless the claims related to Safari were settled, the Registrar would take that into account in considering any application by Norhome for registration because of the common principal shareholder John Newton. There was no evidence presented to the Tribunal, that in the intervening years, steps were taken by either Safari or Mr. Newton to discharge the outstanding claims in whole or in part.

The Act distinguishes between "law" and "integrity" and requires both elements. "Integrity" is not defined in the Act. The Shorter Oxford English Dictionary defines it as:

1. The condition of having no part or element wanting; 2. unimpaired or uncorrupted states; original perfect condition;
- 3.b. Soundness of moral principle; the character of uncorrupted virtue; uprightness, honesty, sincerity.

The Tribunal finds that during 1979 and 1980, when granted that Safari was in financial difficulty, Mr. Newton as principal officer and directing force of Safari did not conduct himself with integrity with respect to Safari's undertakings, and that the Registrar was not in error in concluding that the past conduct of Mr. Newton afforded reasonable grounds for belief that Norhome's undertakings will not be carried on in accordance with law and with integrity and honesty.

The Tribunal agrees with counsel for Norhome that not every house is constructed "perfectly". It is precisely because a "perfect" house may not be constructed that the Warranty Program was established and provision was made under the Act that if the defects were warrantable, the builder in the first instance, or the Program would rectify the matters. If the Program pays for the repairs, it is incumbent upon the builder by the terms and conditions of registration that the builder indemnify the Program for these costs. The Tribunal finds that the large number of claims against Safari, even though some were of a minor nature, indicates that under Mr. Newton's control and directions, Norhome does not have sufficient technical competence consistently to perform the warranties under the Act.

Accordingly and by virtue of the authority vested in it under Section 9(4) of the Ontario New Home Warranties Plan Act, the Tribunal directs the Registrar to carry out his Proposal to refuse the applicant's registration under the Plan.

The Tribunal directs the applicant's attention to Section 10 of the Act which reads as follows:

A further application for registration may be made upon new or other evidence or where it is clear that material circumstances have changed.

REGENCY HOMES INC.

APPEAL FROM A PROPOSAL OF THE REGISTRAR UNDER THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO REFUSE TO RENEW THE REGISTRATION

TRIBUNAL STEPHANIE J. WYCHOWANEC, Q.C., CHAIRMAN, PRESIDING
HELEN J. MORNINGSTAR, MEMBER
D.W. MacFARLANE, MEMBER

APPEARANCES:

B.N. MIDANIK, representing the Applicant

BRIAN CAMPBELL, representing the Registrar under the
Ontario New Home Warranties Plan Act

DATE OF

HEARING: 24 February 1986

Toronto

REASONS FOR DECISION AND ORDER

This is an appeal by Regency Homes Inc., a Corporation registered under the Ontario New Home Warranties Plan Act from a Notice of Proposal of the Registrar, wherein the Registrar proposes to refuse to renew the Corporation's registration. As required by section 9 of the Act, the Registrar in the Notice of Proposal dated March 21, 1985, listed in detail the numerous, and if proven, very serious incidents showing a record of breaches of the Act, which in his opinion, afforded reasonable grounds for belief that the Corporation, Regency Homes Inc. and its officers and directors, Joe Fishman and Ike Katz would not carry out the corporate undertakings in accordance with law and with integrity and honesty.

No witnesses were called by either party to this hearing. However, at the commencement of the hearing, a Statement of Facts was filed as Exhibit 7. The facts in this statement, although not agreed to by counsel for Regency Homes Inc., were not disputed by him. The Tribunal therefore takes these facts as proven. The facts show that Regency Homes Inc. has had a long history of failure to comply with the provisions of the Ontario New Homes Warranties Plan Act and the regulations thereto, and they clearly support all the allegations contained in the Registrar's Notice of Proposal.

At the present time Regency Homes Inc. owes some \$52,000 to the Ontario New Home Warranty Program; monies that have been paid out by the Program as a result of non-compliance with the Act by Regency. Mr. Midanik, counsel for the Regency Homes Inc. did not argue any extenuating circumstances. He conceded that Regency Homes Inc. has defaulted on its undertakings to the Ontario New Home Warranty Program. He also made it quite clear that he could not give any assurance to the Program or to this Tribunal that Regency Homes Inc. would be in a position to repay the Program. He advised the Tribunal that Regency now has some seven houses under various stages of construction which are being built for specific purchasers. He asked the Tribunal to allow Regency to remain a registered builder for a further period of six months to permit these houses to be completed. He argued that confirmation of the Proposal of the Registrar would result in a failure to complete the houses which in turn would result in further claims upon the Program.

Counsel for the Ontario New Home Warranty Program told the Tribunal that the Program was aware of the consequences of refusing to renew the registration, but given the history of Regency Homes Inc., it would be better to terminate the building activities of that Company now.

The Tribunal has reviewed the Proposal and the facts contained in Exhibit 7 and has considered the submissions of both counsel and must agree with the Registrar that the past conduct of Regency Homes Inc. and its officers and directors affords reasonable grounds for belief that the Company's undertakings will not be carried out in accordance with law and with integrity and honesty as required by section 7 of the Act.

Therefore by virtue of the authority vested in it under Section 9(4) of the Ontario New Home Warranties Plan Act, the Tribunal directs the Registrar to carry out his Proposal to refuse to renew the registration of Regency Homes Inc.

MR. AND MRS. CHARLES R. STUART

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: STEPHANIE J. WYCHOWANEC Q.C., CHAIRMAN, PRESIDING
F. THOMAS PEOTTO, MEMBER
D.H. MACFARLANE, MEMBER

APPEARANCES:

MR. AND MRS. CHARLES R. STUART,
appearing on their own behalf

CAROL STREET, representing the
Ontario New Home Warranty Program

DATES OF

HEARING: 27 January 1986

Toronto

REASONS FOR DECISION AND ORDER

The facts leading to this claim are as follows. In August 1980, the Applicants purchased a new home from the Cadillac Fairview Corporation. In late December 1984, three major leaks originated high on the basement walls which affected the use of the recreation room in the basement. One of the leaks appeared to be behind the fuse box. By March, 1985, there were an additional 7 leaks on all 4 walls of the basement. One leak was around the electric conduit leading into the fuse box and it was this leak which caused the Applicants the greatest concern because of the potential safety hazard. The remaining leaks were apparently from the rod holes in the basement walls. From the evidence there appeared to have been no cracks in the basement walls other than the leaks. When the leak around the electric conduit was noted, the Applicants apparently telephoned the Ontario New Home Warranty Program, and not being satisfied with the response, contacted a contractor about the problem. The Applicants attempted to divert the water around the electrical conduit leak and because of their concern, retained a contractor to repair all the leaks. These repairs were carried out immediately in March without the prior approval and authorization of the Program. Inspection by the Program did not occur until April 22, 1985, after the repair work had been completed.

The Applicants now claim the sum of \$3,548.00 which is the cost of the repair work done plus interest on that amount. The Applicants' claim was denied by the Ontario New Home Warranty Program on the basis that the leaks do not constitute a major structural defect and did not materially affect the use of the building.

To succeed before this Tribunal, the Applicants must establish the existence of a major structural defect as defined in the Regulations to the statute.

There is no dispute that there were leaks in the basement and that there was some water damage sustained to the walls. The Tribunal does not doubt that the Applicants were very much concerned about the potential safety hazard. However, the issue before the Tribunal is whether the warranty provided by the statute is available to the Applicants in these circumstances. Upon reading the Act and the Regulations and the many decisions of this Tribunal, including the Peirpoint decision referred to it by counsel for the Program, and while the Tribunal is sympathetic to the Applicants, it must come to the decision that the leaks were not sufficient to affect the load bearing portion of the building nor did they adversely affect the use of such building as a whole for the purpose for which it was intended.

Accordingly by virtue of the authority vested in it under Section 16(3) of the Ontario New Home Warranties Plan Act, the Tribunal directs the Ontario New Home Warranty Program to disallow the claim.

ANTHONY BOLAHOOD

APPEAL FROM A PROPOSAL OF THE
REGISTRAR OF REAL ESTATE AND BUSINESS BROKERS
TO REFUSE TO GRANT REGISTRATION

TRIBUNAL: STEPHANIE J. WYCHOWANEC, O.C., CHAIRMAN, PRESIDING
BARBARA J. SHAND, MEMBER
M. JEAN WORMLEY, MEMBER

APPEARANCES:

ANTHONY A. BOLAHOOD, appearing on his own behalf

STEPHEN A. AUSTIN, representing the Registrar under
the Real Estate and Business Brokers Act

DATE OF

HEARING: 30 April 1986

Toronto

REASONS FOR DECISION AND ORDER

The Applicant, Anthony Bolahood appeals the Proposal of the Registrar of Real Estate and Business Brokers to refuse his registration as a real estate salesperson. The reason given for refusing to grant registration was that in the opinion of the Registrar, the past conduct of the Applicant afforded reasonable grounds for belief that he would not carry on business in accordance with law and with integrity and honesty. The basis of this opinion was that Mr. Bolahood had been involved in a real estate transaction while not being registered as a real estate salesman contrary to the provisions of the Real Estate and Business Brokers Act.

Several witnesses were called by the Registrar. Mr. Bolahood represented himself.

During the period February 1979 to December 1982, Mr. Bolahood had been registered as a real estate salesman. Thereafter, having allowed his registration to lapse, he became and was at the material time, the Property Manager of a condominium building at 55 William Street East in Oshawa and apparently owned some 30 units in that building.

In mid-August, 1985, he was approached by some personal acquaintances - the Yeomans, who wished to purchase a condominium unit in the William Street building. At that time, Mr. Bolahood had 3 units of his own for sale which he showed to the Yeomans. He was aware, through a newspaper advertisement, of another unit in the building which was for sale under an exclusive listing agreement with Metcalf Realty Associates and the Yeomans wanted to see that unit as well. According to Mr. Bolahood, he telephoned the Metcalf offices, identified himself by giving his name, and obtained permission from a secretary to show the listed premises which he proceeded to do. According to the testimony of Mrs. McIsaac, one of the vendors, she assumed that Mr. Bolahood was from the Metcalf office.

As it turned out, the Yeomans preferred the McIsaac property over those owned by Mr. Bolahood. It is at this point that Mr. Bolahood showed faulty judgement. Rather than immediately referring the Yeoman's to the listing broker, he approached the vendors to tell them that he had an offer for their unit. Such approach by a person not registered under the Act is contrary to section 3 of the Act.

At the time that Mr. Bolahood came to the vendors, a salesman from the Metcalf firm was already at the premises with another offer. Mr. Bolahood left and evidently called the Metcalf offices again. According to the testimony of Mrs. Hartwig, a saleswoman with the Metcalf firm, Mr. Bolahood said he was a real estate salesman and asked if he could co-broke the McIsaac property as he had an offer. Mrs. Hartwig told him that because there was an outstanding offer, Mr. Bolahood would have to wait. Evidently that same day, there was a similiar discussion with Mr. Metcalf as well. The Metcalf office checked Mr. Bolahood's credentials and found that Mr. Bolahood was not registered as a real estate salesman as he had claimed to be.

At some point during the evening of the same day, as Mr. Bolahood put it, "it fizzed on me at the time that I didn't have the authority to sell the property". He then asked the Yeomans to leave the offer for a day. The following morning, Mr. Bolahood went to the real estate offices of Canada Permanent Trust and asked to be taken on as a salesman "to make the deal back to the norm".

Mr. Bolahood explained the situation of the offer to the Manager at Canada Permanent, and the Manager agreed to co-broke the sale with Metcalf in the name of Canada Permanent. Metcalf agreed to this arrangement and the Yeoman offer was then presented to the vendors and accepted. Meanwhile, an application was made through the Canada Permanent office for the registration of Mr. Bolahood as a salesman in that office because although Mr. Bolahood had told the Manager that he had a registration in transit, the Manager was certain that Mr. Bolahood was not registered at the time.

Several days later, Mr. Metcalf wrote to the Registrar to complain of Mr. Bolahood's conduct and subsequently the Registrar refused the registration of Mr. Bolahood.

The Tribunal has considered the evidence and finds that in some instances Mr. Bolahood deliberately left an impression that he was a registered real estate salesman and in others, he, in fact, held himself out to be one. The Tribunal notes that he did attempt to put matters right but even in this, he was not totally candid.

The Tribunal also finds that contrary to the Act, Mr. Bolahood attempted to trade in real estate knowing that he was not registered as a salesman.

The Tribunal is of the opinion that in making the decisions that he did and in taking the action that he did, Mr. Bolahood showed a lack of integrity and a disregard for the law. For these reasons, by virtue of the authority vested in it under Section 9(4) of the Real Estate and Business Brokers Act, the Tribunal directs the Registrar to carry out his Proposal to refuse Mr. Bolahood's application for registration.

During the course of the hearing, the Registrar stated that he would not consider a further application for registration from Mr. Bolahood for at least one year. The Tribunal does not think that section 10 of the Act contemplates such an arbitrary period. If Mr. Bolahood can satisfy the Registrar that there is new or other evidence, or that clearly the material circumstances have changed, then his application should be considered.

Mr. Bolahood asked the Tribunal to make it a term or condition of its Order that he be exempt from completing the course of study and passing the examinations required by the Registrar. The Tribunal cannot make such an order because section 14(4) of Regulation 891 is mandatory. The subsection reads as follows:

(4) Where a person has previously been registered and he has surrendered or has had his registration terminated and more than three years have elapsed since such surrender or termination, prior to again being registered, he shall complete the course or courses of study approved by the Registrar and pass the written examination or examinations approved by the Registrar.

Even if the Tribunal had the jurisdiction to exempt Mr. Bolahood from this requirement, it would not do so in the circumstances of this case.

HAROLD BRAY REAL ESTATE COMPANY LIMITED and
HAROLD I. BRAY

APPEAL FROM A PROPOSAL OF THE
REGISTRAR OF REAL ESTATE AND BUSINESS BROKERS
TO REFUSE TO RENEW THE REGISTRATIONS

TRIBUNAL: MATTHEW SHEARD, Q.C. VICE-CHAIRMAN, PRESIDING
HELEN J. MORNINGSTAR, MEMBER
M. JEAN WORMLEY, MEMBER

APPEARANCES:

A.N. MAJAINA, representing the Registrar under the
Real Estate and Business Brokers Act

No one appearing for the Applicant

DATE OF
HEARING: 4, 5 November, 1985

Toronto

REASONS FOR DECISION AND ORDER

The Applicant requested this hearing by way of an appeal from the Proposal of the Registrar of Real Estate and Business Brokers to revoke his registration as a registered real estate broker (as well as that of his Company) but he failed to show up, although duly served with an Appointment For and Notice of Adjourned Hearing, ~~either in person or by~~ counsel. The proceedings therefore went forward in his absence.

The facts were both straightforward and distasteful. Mr. Bray had held registration for many years, since April 30, 1962. In 1983 he was employed by a group of developers operating as an Ontario company to find tenants for their shopping plaza project. They already had two or three major commercial tenants and required the usual sort of diverse mercantile tenancies to complete the impression of universal variety for their project which is found to attract the public, e.g., a restaurant, a barber shop, a beauty salon, perhaps a paint shop, a cheese shop, specialty clothing shops, etc. He set up a sort of on-site office in a trailer and divided his time between that location and his offices in Brampton, where he carried on a long established business.

The system whereby the desired tenants were found was something like this. Advertisements, including a sign on the building site of the new shopping plaza, solicited enquiries from prospective tenants. Mr. Bray would determine what was the nature of the business carried on by the prospective tenants. If, for example, the prospective tenant was a donut vendor and his principals wanted a donut shop in the plaza, then he was meant to get the prospect to submit an offer to lease in writing accompanied by a cheque payable to his firm to secure the offer, and later cover Bray's broking commission. The lessor-developers would either accept or reject the offer depending upon whether they either wanted or needed the proposed tenancy. If the offer was rejected the deposit was refundable by Mr. Bray to the rejected offeror in the usual way.

Apparently Mr. Bray, whom we gather from the evidence was growing somewhat advanced in age with a severe drinking problem, perceived an opportunity to dishonestly exploit this system to his advantage. It seems that he accepted deposits, accompanied by offers to lease, from a number of prospective tenants whose mercantile operations, (e.g. a beauty salon and a proposed tearoom) were either already covered by completed leases or else not desired by the developers on their roster of services to be available at the plaza. These deposits he apparently converted to his own use while failing to communicate the offers to the developers. When pressed by the offerors for the return of their deposits, he put them off with a variety of excuses. For example, one lady, who had given him a substantial sum as ~~a deposit on a proposed lease of space for a tearoom~~ operation, was told that her deposit had been spent on architect's drawings. This was an untruth and the lady wrote him accusing him of perpetrating a "cheap swindle". At all events, Mr. Bray was caught by the police, charged, convicted under the Criminal Code, and imprisoned.

It remains only to express the disapproval of the Tribunal and to disallow this appeal from the Registrar's Proposal to revoke registration, a proposal which, on the evidence and in the circumstances, seems the only possible disposition of this matter.

Accordingly, by virtue of the authority vested in it under Section 9(4) of the Real Estate and Business Brokers Act, the Tribunal directs the Registrar to carry out his Proposal and refuse to renew the registrations of Harold Bray Real Estate Limited and Harold Bray as registered real estate brokers.

EDGAR C. DOWNIE

APPEAL FROM A PROPOSAL OF THE REGISTRAR
OF REAL ESTATE AND BUSINESS BROKERS

TO SUSPEND REGISTRATION

TRIBUNAL: MARY JANE BINKS RICE, Q.C., VICE-CHAIRMAN, PRESIDING
F. THOMAS PEOTTO, MEMBER
DWIGHT LONDON, MEMBER

APPEARANCES:

JEHUDA J. KAMINER, representing the Applicant

STEPHEN MARTIN, representing the Registrar of
Real Estate and Business Brokers

DATES OF

HEARING: 25, 26 February 1986

Kingston

REASONS FOR DECISION AND ORDER

This is an appeal by Edgar C. Downie who has been registered as a Real Estate salesman since 1974, pursuant to the Real Estate and Business Brokers Act, R.S.O. 1980, Chapter 431, hereinafter referred to as The Act, from a Proposal of the Registrar of the said Act dated April 9, 1985. The Registrar proposes to suspend the registration of the Applicant for a term of six months forthwith. The Proposal is based almost entirely on allegations made by the parties to a real estate transaction in the summer of 1983 as to the circumstances of that real estate transaction and Mr. Downie's conduct.

In brief, the Registrar cites in his Notice of Proposal the following scenario and course of conduct by Mr. Downie:

- (1) Mr. and Mrs. Gwynne-Timothy were the joint owners of a real estate property at 400 Roosevelt Drive, Kingston, Ontario, hereinafter referred to as the Roosevelt property.
- (2) In July of 1983 the Gwynne-Timothys contacted Campeau Realty Ltd. of Kingston, Ontario, and made them aware of their interest to relocate near Cataraqui Golf

Club in that City. Shortly after, Ralph Valentine, who was a salesman with Campeau Realty, informed the Gwynne-Timothys of a property located at 24 Richfield Place, Kingston, hereinafter referred to as the Richfield property.

- (3) The Gwynne-Timothys made an offer to purchase the Richfield property at \$100,000.00 conditional upon the sale of the Roosevelt property. The Roosevelt property was listed exclusively with Campeau Realty with an expressed understanding that the selling price less commission would be not less than \$85,000.00, or \$89,000.00 asking price.
- (4) On July 29, 1983, Ralph Valentine, who had obtained the exclusive listing of the Roosevelt property, on behalf of Campeau Realty, introduced prospective buyers to the Roosevelt property and to Mrs. Gwynne-Timothy. Mrs. Gwynne-Timothy was unaware of their identity but these people appeared extremely enthusiastic as to the property.
- (5) On July 30, 1983, Edgar C. Downie, as a registered salesman of Pratt & Murray Realty Ltd., negotiated co-brokering arrangements with Mary Campeau, the president of Campeau Realty, as Edgar C. Downie represented to Mary Campeau that he had prospective purchasers who might well be interested in the Roosevelt property. On that day, the Applicant attended at the Roosevelt property and met Mrs. Gwynne-Timothy who was in the property. The Applicant indicated to her he was inspecting the property on behalf of prospective purchasers from Kingston and, after a short inspection, he left indicating to her that this was just about what his clients desired to purchase.
- (6) Later that same day, Mary Campeau and the Applicant presented a written Offer to the Gwynne-Timothys by purchasers of the name of "Hachey and Pouliot" for \$83,000.00.

- (7) The Gwynne-Timothys submitted a Counter-Offer for \$88,500.00 and a printed term numbered 8, hereinafter referred to as the "term numbered 8" appearing in the Agreement of Purchase and Sale as amended by Mary Campeau by the insertion of the word "Not" between the words "acknowledge" and "having inspected", was initialled by the Gwynne-Timothys, with the result that the term read as follows:
- "8. Purchaser acknowledges 'not' having inspected the property prior to submitting this Offer and understands that upon Vendor accepting this Offer there shall be a binding Agreement of Purchase and Sale between Purchaser and Vendor."
- (8) On August 1, 1983, the prospective Purchaser countered with a purchase price of \$86,500.00. After considerable deliberations, the Gwynne-Timothys decided to sell the property for \$86,500.00 with a reduced total commission of only \$3,000.00.
- (9) On August 2, 1983, Ralph Valentine and the Applicant Edgar C. Downie presented a new Offer for \$86,500.00. The term numbered 8 was marked identically by Mary Campeau to read as it had read as altered by the Gwynne-Timothys. When Ralph Valentine delivered an executed copy of the Agreement to the Gwynne-Timothys he indicated that "Hachey and Pouliot" were one and the same as the persons who had first viewed the property with him on July 29, 1983.
- (10) The Gwynne-Timothys communicated their concern with events to Mary Campeau. Basically, they felt that the non-disclosure by the Applicant of the identity of the Purchasers prevented them, or may have prevented them, from obtaining the best possible sale price for their property.
- (11) The Gwynne-Timothys did instruct their solicitor to close the transaction but to hold the balance due of the real estate commission in his trust account.

- (12) Subsequently, Pratt & Murray Ltd. successfully sued the Gwynne-Timothys for the balance owing of the real estate commission, receiving a Judgment in its favour from the District Court of Ontario at Kingston on September 9, 1985.
- (13) The Gwynne-Timothys contacted the Kingston Ontario Real Estate Association and made their demands known. The Association decided on behalf of the Applicant and of Ralph Valentine that no charges be laid. The Ethics Committee, however, did express its concern that the Applicant had permitted an incorrect and misleading statement in the Offer in question.
- (14) Upon learning that the Real Estate Association would not take action, the Gwynne-Timothys disclosed the foregoing to the Registrar.

After reviewing the aforementioned information, and obtaining copies of the written explanations from Mary Campeau, Edgar C. Downie and Ralph Valentine to the Kingston Ontario Real Estate Association, the Registrar formed the conclusion that the Applicant should have his registration suspended for a term of six months for the reason that the foregoing conduct affords reasonable grounds for belief that the Applicant would not carry on business in accordance with law and with integrity and honesty. Edgar C. Downie was the agent of the Gwynne-Timothys and he had, as agent, a duty to disclose all pertinent facts. He failed to disclose all pertinent facts and, in particular, encouraged an incorrect and misleading statement in an Offer. He deceived his principals whereas he had a duty at all times to protect their interest. In summary, the Registrar believes that because of Downie's deception, the Gwynne-Timothys were not permitted to bargain to the best of their ability, or in the alternative, their bargaining position, or capacity, was weakened considerably by Downie's deception.

The Registrar called Robert Gwynne-Timothy, Ralph Valentine, Mary Campeau, and himself to testify on behalf of the Ministry. Mr. Coleclough, the Registrar, reiterated his concern about Edgar Downie's conduct. The Registrar testified that the Applicant must have rationalized that he was actually acting on behalf of the Purchasers and this

attitude slipped into a deception of the Vendors. The Applicant was acting, in law, on behalf of the Vendors and he clearly failed to protect their interests, and, in fact, mislead them to possibly defeat their best interests. The Registrar testified that he was very concerned that the Act, which is basically an Act of public protection, be perceived to be effective as to its purpose. The Registrar also testified that there was an unfortunate "confusion" in the perception of many in the real estate industry as to whether the Purchaser or Vendor was the client.

The Applicant testified on his own behalf. It was clear from his testimony, and that of his employer on his behalf, that he was both a successful and experienced agent. It was also apparent from the Registrar's testimony that there had been no previous complaints as to Edgar C. Downie's conduct as a real estate agent, from the time of his registration in January of 1974.

After reviewing all the testimony, the Tribunal is of the opinion that, to coin a term used by the Registrar in his Proposal, the explanation of events given by Mr. Downie is "tortured". The Tribunal can come to only one conclusion - that he, as agent for the Gwynne-Timothys, purposefully, not inadvertently, mislead them as to the identity of the Purchasers of their property during the submission of the Offers. He withheld information in order to advance his own interest or that of the Purchaser whereas his duty lay to the Gwynne-Timothys, to advance their best interests. It is not a relevant consideration that the Gwynne-Timothys may not have suffered a financial loss as a result of the course of events. On this particular point, the Tribunal reaches no conclusion.

The Tribunal agrees with the Registrar that any failure to disclose to a principal by a registered real estate agent must be viewed as serious misconduct.

Accordingly, in the circumstances, and bearing in mind the otherwise unblemished record of the Applicant, the Tribunal, pursuant to the authority vested in it subject to Section 9(4) directs the Registrar to refrain from carrying out his Proposal to suspend the registration of the Applicant for a period of six months to the extent that the foregoing period be reduced from six months to one month and the suspension commence forthwith.

FOCUS REALTY LIMITED and
VLADIMIR BAOTIC

APPEAL FROM A PROPOSAL OF THE
REGISTRAR OF REAL ESTATE AND BUSINESS BROKERS
TO REVOKE THE REGISTRATIONS

TRIBUNAL: STEPHANIE J. WYCHOWANEC, Q.C., CHAIRMAN, PRESIDING
BARBARA J. SHAND, MEMBER
JOHN W. PATERSON, MEMBER

APPEARANCES:
ROCCO A. GRILLI, representing the Applicants
JOHN BURTON, representing the
Registrar of Real Estate and Business Brokers

DATE OF
HEARING: 12 November 1986 Toronto

REASONS FOR DECISION AND ORDER

This is an appeal from a Proposal of the Registrar of Real Estate and Business Brokers made under Section 9(1) of the Real Estate and Business Brokers Act to revoke the registration of Focus Realty Limited and Vladimir Baotic, both registered brokers. Mr. Baotic is the sole shareholder, director and officer of the Corporation and has been since November, 1981.

In the Notice of Proposal, the Registrar cited thirty-seven instances whereby moneys paid in trust to Focus were improperly disbursed contrary to Section 20(1) of the Act. All these violations occurred over a ten month period in 1985. In addition, the Registrar alleged that Focus, acting through Mr. Baotic and Mr. Baotic personally, did furnish false, misleading or deceptive information when he failed to disclose two longstanding judgments, one against himself, and the other against himself and Focus jointly, when he applied for renewal of registration in 1983 and again in 1985.

These allegations were admitted by counsel for Mr. Baotic and Focus. Two witnesses were called on behalf of Mr. Baotic, essentially as character witnesses. Mr. Baotic did not testify.

Mr. Grilli argued on behalf of his clients, that in reaching its decision, the Tribunal should take into account a number of mitigating factors. According to Mr. Grilli, the financial difficulties of Focus and Mr. Baotic arose because the bank had refused to grant a line of credit. Without this, Mr. Baotic was forced to use trust funds to pay his operating expenses and his salespersons. (It is to be noted that Mr. Baotic evidently did not use the trust funds for his own personal gain). Apparently the bank now has provided some sort of arrangement which allows the operating expenses of the business to be paid as they arise. Mr. Grilli submitted that, given this development and the general improvement in Mr. Baotic's financial position, it is unlikely that further tampering with trust funds will occur in the future. As for the outstanding judgments, he said that arrangements were being made to retire the personal judgment and that there was a dispute, yet to be resolved, over who was actually responsible for paying the other judgment. Mr. Grilli pointed out that the books and records of the business were complete and that no member of the public had suffered a loss as a result of Mr. Baotic's actions.

Mr. Baotic, we are told, is 39, married, with four children. He has taken a number of steps to improve his position in life. The record shows that he has been in the real estate industry since November 1974. There is no evidence of any previous complaints or misdemeanors under the Real Estate and Business Brokers Act. As far as the Tribunal is aware, there is no previous criminal record or bankruptcy for either registrant. The character witnesses gave evidence of Mr. Baotic's generally good reputation in his own community and in the real estate industry in Hamilton.

The business premises are rented under a lease which expires in 1990 with an option to renew for a further five years. Leasehold improvements costing some \$25,000 have been made to the premises. The firm employs some 19 salespersons, most on a part time basis.

Mr. Grilli, in a very able argument, asked that Mr. Baotic be given a second chance. He urged the Tribunal to impose a penalty less harsh than revocation of registration. He suggested that Mr. Baotic personally be allowed to continue as a real estate broker, but under the supervision of another broker who would oversee the trust account for a

period of two or three years. Alternatively, he proposed that Mr. Baotic's registration be that of a salesman, because as such, he would not have access to trust funds.

In the past, the Tribunal has taken a very serious view of both infractions under the Real Estate and Business Brokers Act, and does so now.

In his application for renewal of registration, Mr. Baotic in 1983 and again in 1985 reported that there were no outstanding judgments against him. This was patently false and misleading. The same false information was contained in the application to renew the corporate registration.

As the Tribunal understands the facts, the personal judgment against Mr. Baotic arose out of a student loan made to him in 1974. It is now well over a decade since that debt was incurred, and it is only now that some effort is being made to retire it. This course of conduct does not show integrity on the part of Mr. Baotic. The second judgment against Focus and Mr. Baotic appears to have been signed shortly after the corporate application for renewal had been made in 1985. Certainly the writ of execution was filed after both 1985 applications had been made.

The breaches of Section 20(1) of the Act are even more serious. Mr. Baotic appears to think that it is all right to use trust funds for business purposes so long as the trust funds are eventually returned to the proper persons. He also appears to have imparted this belief or attitude to at least one of his former salespersons. This is simply not the case. There is no excuse whatsoever for improperly disbursing or using trust funds. In this case, the misuse of trust funds was not an isolated event, out of character, but a standard practice, for an extended period of time. The Tribunal agrees with the Registrar that Mr. Baotic's conduct, and through him, the conduct of Focus was such as to afford reasonable grounds for belief that he will not carry on business in accordance with law and with integrity and honesty.

The Tribunal was urged to impose a lesser penalty on Mr. Baotic. We have considered the alternatives proposed by Mr. Grilli, but have concluded that neither is appropriate in the circumstances.

Therefore, by virtue of the authority vested in it under Section 9(4) of the Real Estate and Business Brokers Act, the Tribunal directs the Registrar to carry out his Proposal to revoke the registrations of both Focus Realty Limited and Vladimir Baotic.

The Tribunal reminds Mr. Baotic of Section 10 of the Real Estate and Business Brokers Act which states that, "A further application for registration may be made upon new or other evidence or where it is clear that material circumstances have changed".

R.S. HARMER REAL ESTATE LTD. and
RONALD S. HARMER

APPEAL FROM A PROPOSAL OF THE
REGISTRAR OF REAL ESTATE AND BUSINESS BROKERS
TO REVOKE THE REGISTRATIONS

TRIBUNAL: STEPHANIE J. WYCHOWANEC, Q.C., CHAIRMAN, PRESIDING
HELEN J. MORNINGSTAR, MEMBER
M. JEAN WORMLEY, MEMBER

APPEARANCES:
WILLIAM HOWARD HAMILTON, representing the Applicants
STEPHEN P. MARTIN, representing the
Registrar of Real Estate and Business Brokers

DATE OF
HEARING: 18, 19 November 1986 Toronto

REASONS FOR DECISION AND ORDER

This is an appeal from a Notice of Proposal issued by the Registrar, Real Estate and Business Brokers Act, wherein he proposed to revoke the registrations of R.S. Harmer Real Estate Ltd. (hereinafter referred to as the "Company") and Ronald S. Harmer. It is the Registrar's opinion that the past conduct of both the Company and Mr. Harmer affords reasonable grounds for belief that their business will not be carried on in accordance with law and with integrity and honesty. The conduct complained of is an error in a listing of lake front property with a cottage. This error was brought to the attention of the Registrar by the purchasers of the property who allege that they relied on the information contained in the listing to their detriment.

The property in question is an irregular lot in Rama Township fronting on Lake Couchiching. The property was initially listed by Don Grieg, a salesman in the Company's employ, in April, 1981. The lot size was described in the Listing Agreement as "50 x 120 (irr)". On the Listing Agreement in bold print is the notice that "All measurements are approximate!" This listing expired prior to the property being sold. In February, 1983, the property was re-listed with the Company. Mr. Harmer himself is shown as the salesperson on the listing. The lot size on this listing

is shown as "F.50' Rd 100' Depth 150' app". The same dimensions were used in a later Listing Agreement dated October, 1983. Mr. Harmer was again shown as the salesperson on the agreement. The property was eventually sold from this listing to Mr. and Mrs. Robert Aitken in November 1983. The Agreement of Purchase and Sale describes the property as "having a frontage of 50' more or less by a depth of 150' more or less". The description of the lot in the deed and the survey attached to the deed shows a lake frontage of "40 feet more or less" at the high water mark.

Mr. Aitken said that he was unaware of the discrepancy until some time after the transaction was completed. He said he only became aware of the narrower lake frontage when he received a Notice of Assessment from Rama Township sometime in early 1984. He then took steps against his solicitor for not bringing the matter to his attention prior to completing the purchase and against Mr. Harmer and the Company. When Mr. Harmer became aware of the problem, he referred the matter to his insurance adjusters. In due course, the adjusters informed Mr. Aitken's new solicitor that they "failed to see any liability on the part of our insured and also do not appreciate that there could be any damages whatsoever".

Several months later Mr. Aitken complained to the Registrar about the conduct of the Company and Mrs. Irene Lee, the salesperson with the Company, who actually introduced the property to Mr. Aitken. Following an investigation by the Registrar's office and a meeting with Mr. Harmer, the Notice of Proposal was issued.

In the Notice the Registrar alleges that Mr. Aitken relied to his detriment on representations and assurances made by the Company and Mr. Harmer; that Mr. Harmer admitted that the error in the second listing was due to his own neglect in relying on dimensions contained in a previous listing; and that Mr. Aitken had not been compensated "or otherwise had his complaint resolved by Harmer or the Company". At the hearing, the Registrar testified that it was his position that the public must rely on the expertise and integrity of real estate brokers with whom it deals, and that Mr. Harmer had not taken reasonable care in preparing the listing, thus placing the public at risk. It was his conclusion that having regard to all the circumstances, the registration of both the Company and Mr. Harmer should be revoked.

Mr. Harmer said that he used the lot measurements from the 1981 listing. This may or may not be the case since the measurements in 1983 differ from those used in the earlier listing. There was no explanation given for this difference. Mr. Harmer also said that he had asked the vendors for a deed or survey so that the actual measurements could be ascertained, but that he had never received these documents.

The Tribunal has weighed the evidence carefully. The regrettable error in itself does not constitute a breach of the Real Estate and Business Brokers Act. Whether Mr. Harmer and/or the Company would have been liable for damages in a civil action is a moot point. It is also immaterial to the Tribunal's deliberations whether Mr. Aitken, an apparently knowledgeable buyer of real estate, relied to his detriment on the representations as to the width of the frontage - Mr. Aitken said that he had "stepped off" the frontage and had thought it was less than 50 feet, but had not asked for a measurement to be taken. The issue for the Tribunal to decide based on the evidence before it is whether the Registrar's Proposal is reasonable. The Tribunal is of the opinion that it is not.

The evidence before the Tribunal is that, aside from this one error, Mr. Harmer and the Company have had an unblemished record in the real estate field.

It is the Tribunal's opinion that in relying either on a previous listing or the verbal assurance of the vendor, Mr. Harmer was lax, if not negligent, and in fact placed potential purchasers at risk. The Tribunal agrees with the Registrar that members of the public are entitled to rely on the facts conveyed to them when a purchase of real estate is contemplated. There is an onus on the real estate broker or salesperson to take reasonable and careful steps to ensure that the information that is being imparted is correct.

Had no further action been taken by Mr. Harmer, after being informed of the error, the Tribunal would be inclined to be quite severe with Mr. Harmer and the Company. However, and apparently unknown to the Registrar when he made his Proposal, Mr. Harmer had instituted a practice in his offices which will significantly reduce if not entirely eliminate, any further errors of the kind complained of in this case. Mr. Harmer has now obtained the services of a professional title searcher who makes a subsearch in the Registry office of all property listed by the Company or Mr. Harmer. The subsearch provides the correct measurements of

the property and details of any mortgages or other encumbrances. The subsearches are made daily before the listings are made available to his salespersons and other real estate brokers. Mr. Harmer also asked the Orillia and District Real Estate Board to institute this practice throughout the area, however, the suggestion was turned down. These steps taken by Mr. Harmer are commendable.

There appears to have been some misunderstanding initially as to the amount of restitution or compensation which would have satisfied Mr. Aitken. When Mr. Harmer was aware that the sum was \$2,000, he paid it.

In taking these actions promptly and voluntarily, Mr. Harmer, and through him, the Company, has shown that both will likely act in compliance with Section 6(1)(b) of the Act in the future. Therefore, revocation of registration would be an unduly harsh penalty. Given all the considerations, the Tribunal is of the opinion that a suspension of fourteen days duration against Mr. Harmer is appropriate. The Tribunal expresses the hope that, assuming there are no future breaches of the Act, this suspension of Mr. Harmer will not negatively affect any application for renewal of registration of him personally or of the Company.

At the commencement of this hearing, counsel for the two Applicants argued that the Registrar was without jurisdiction to make a Proposal in the particular circumstances of this case. At that time, the Tribunal reserved its decision on this motion. It is the Tribunal's opinion that the Registrar did have the authority to proceed with the Proposal.

By virtue of the authority vested in it under Section 9(4) of the Real Estate and Business Brokers Act, the Tribunal directs the Registrar not to carry out the Proposal against R.S. Harmer Real Estate Ltd. or Ronald S. Harmer but to suspend the registration of Ronald S. Harmer for a period of fourteen days commencing December 17th, 1986.

WILHELM HAURENHERM

APPEAL FROM A PROPOSAL OF
THE REGISTRAR OF REAL ESTATE AND BUSINESS BROKERS
TO REVOKE THE REGISTRATION

TRIBUNAL: STEPHANIE J. WYCHOWANEC, Q.C., CHAIRMAN, PRESIDING
HELEN J. MORNINGSTAR, MEMBER
JOHN W. PATERSON, MEMBER

APPEARANCES:
WILHELM HAURENHERM, appearing on his own behalf

A.N. MAJAINA, representing the Registrar under the
Real Estate and Business Brokers Act

DATES OF
HEARING: 20 and 21 January 1986 Toronto

REASONS FOR DECISION AND ORDER

This is an appeal from a Proposal of the Registrar of Real Estate and Business Brokers to revoke the registration of Wilhelm Haurenherm as a registered real estate salesman.

The Proposal is supported by two basic allegations of the Registrar, namely, that in connection with the sale of some 28 homes in a new subdivision, Haurenherm acted throughout as a real estate broker and not as a salesman and that in applying for a renewal of registration as a salesman, Haurenherm falsely omitted to disclose "the full true and material particulars" in connection with his activities in selling the new homes.

The main witness called on behalf of the Registrar was William Cardle, a registered real estate broker. Mr. Haurenherm, not represented by counsel, gave evidence on his own behalf.

The evidence of Cardle in many instances was flatly contradicted by Haurenherm, however certain basic facts were not denied.

Wilhelm Haurenherm has been registered as a salesperson under the Real Estate and Business Brokers Act continuously from July 13, 1967 to the present and during this period has been employed by numerous real estate brokers.

Sometime in 1979 Haurenherm reached an agreement or understanding with the principals of Reixach Brothers Company Limited, a developer and builder of new homes in a subdivision known as Goldberry Square to sell these houses on the Company's behalf. Apparently neither the Company nor the principals were prepared to officially "list" the properties for sale. The agreement was personal to Haurenherm. His broker/employer at that time, Century 21 Adelman Limited, had no contact with the developer.

In September 1979, Mr. Haurenherm joined Bill Cardle Real Estate Limited, also a registered broker, as a salesman. The circumstances of the first meeting between Messrs. Cardle and Haurenherm and the agreement as to the terms and conditions of employment are in dispute. According to the records of the Ministry of Consumer and Commercial Relations, Haurenherm remained a registered salesman with Bill Cardle Real Estate Limited from September 19th, 1979 to June 19th, 1981.

During this period Haurenherm appears to have been primarily, but not exclusively, occupied in promoting and selling the houses in the Goldberry Square. Haurenherm was assisted in this activity initially by Edgar Humphrey, another registered salesman and later by Eric Hemmer who was registered as a real estate broker under the name of E. Hemmer Real Estate Limited. Apparently Cardle personally had virtually nothing to do with the sales of these houses. However, there were "For Sale" signs bearing the Cardle name and some Offers to Purchase for these houses were typed and processed through the Cardle office.

Mr. Haurenherm was successful in selling these houses. As each house was sold, Reixach paid a commission directly to Haurenherm. From the proceeds of the commission, Haurenherm paid some monies to Humphrey and later to Hemmer, and some operating expenses associated with the Goldberry Square project such as the telephone bills and rental for the on-site trailer. The balance of the money paid to Haurenherm by Reixach was retained by Haurenherm for his own use. Haurenherm paid no money to Cardle in relation to these sales.

By accepting his commission directly from Reixach, Haurenherm acted in contravention of Section 30 of the Real Estate and Business Brokers Act which reads as follows:

No salesman shall trade in real estate on behalf of any broker other than the broker who, according to the records of the Registrar, is his employer, and no salesman is entitled to or shall accept any commission or other remuneration for trading in real estate from any person except the broker who is registered as his employer. (emphasis added)

According to Cardle's evidence, Haurenherm, after using the Cardle office to have Offers of Purchase and Sale drawn up on two occasions, suggested to Cardle that he, Haurenherm, become a salesman in his office. Haurenherm had an interesting proposition. He would concentrate on selling the houses in the Goldberry Square development and Cardle would be responsible for listing and selling any backup properties related to the purchase of the new houses. In either case, the resulting commission would be split 70% to Haurenherm and 30% to Cardle. The reason given for this division of activity was that Cardle was experienced in selling resale homes in the neighborhood while Haurenherm was experienced in selling homes in new subdivisions. Humphrey, who had worked for the same real estate broker as Haurenherm, would also be working at the subdivision site and according to Cardle, Haurenherm suggested that Humphrey should join the Cardle firm as well. Cardle agreed to all of the terms on the basis of a "handshake" agreement and both salesmen joined Bill Cardle Real Estate Limited.

This version is flatly denied by Haurenherm. According to his testimony, it was Humphrey who first approached Cardle and outlined the working arrangement. Haurenherm later met with Cardle and "verified" with him what Humphrey had already outlined. Haurenherm said that Cardle wanted nothing to do with the sale of the subdivision homes and did not want any commission from the sale of those homes. The latter apparently was primarily interested in the backup sales and agreed to a 75% - 25% commission split with respect to these homes, the 75% share going to Haurenherm even though Cardle was listing and showing these houses himself. Haurenherm also said that he never suggested that Humphrey should join the firm since that had been worked out with Humphrey beforehand.

In the face of such contradiction, the Tribunal can only assume that either there was no meeting of minds between Cardle and Haurenherm, or that one or other is not telling the truth.

Whatever the agreement, Haurenherm began selling the houses in the subdivision along with Humphrey and then Eric Hemmer and Cardle began selling the backup properties. Some commission was paid to Haurenherm by Cardle from these latter sales; no commission was paid to Cardle personally or to the firm with respect to the Goldberry Square sales. This situation continued until virtually all the houses in the subdivision had been sold. Cardle said that he had been told by Haurenherm that no commission was to be recovered by anyone until all the houses in the subdivision had been sold. Cardle was aware in a vague sort of way that houses were being sold in the subdivision because some Offers were being typed in his office and "sold" stickers were being posted for the houses that had been sold in the subdivision which he evidently visited from time to time.

Cardle stated that he did not know that commissions were being paid directly by Reixach to Haurenherm. As a result of a conversation with Hemmer and when only 4 unsold houses remained in the subdivision, Cardle asked for his share of the commission. At that time, according to Cardle, he was told by Haurenherm that no commission was owing to him because all that Cardle was entitled to under their arrangement was the commission on the sale of the backup properties.

However, Haurenherm was prepared to give Cardle \$200 for each unsold house, as they were sold to cover the cost of typing the offers, etc. It is not clear to the Tribunal whether Cardle received these payments, although Cardle admitted that he retained \$200 from some commission that was due and payable by him to Haurenherm.

Haurenherm's version of these events again differs significantly from that of Cardle. Haurenherm insists that throughout the period, Cardle knew houses were being sold and that commission was being paid directly to Haurenherm by the Reixach Company but that Cardle had never asked for a share of such commission. Haurenherm only agreed to give Cardle \$200 because Cardle complained that business outside the subdivision was slow and his office was incurring operating costs in processing the offers related to the development. These payments were never considered by Haurenherm as commission.

The testimony of the two main witnesses differed in one other major respect. According to Haurenherm, after Eric Hemmer had joined him in the subdivision, Hemmer told Haurenherm that the arrangement with respect to the commission payable by Reixach was improper. Haurenherm said this was the first time that the propriety of the arrangement was raised, and he therefore discussed it with Cardle. Cardle is reputed as saying that since there were only some 4 houses left to be sold, the arrangement should continue as it had in the past, and it did.

Cardle's version is different. He states that the problem discussed was how to pay commission to Hemmer with regard to the backup properties since Hemmer was a licensed broker. It was decided that Hemmer would be shown as a co-broker on those listings thus entitling him to a portion of the commission on the backup sales only. According to Cardle, there was no discussion about the propriety of the commission being paid directly by Reixach to Haurenherm for the sale of the new houses except to the extent that Hemmer told Cardle that it was being paid as each house was sold. Cardle stated that it was this information which prompted him to ask for his share of the commission on the subdivision houses.

In June 1981, apparently after all the houses in the Goldberry Square development had been sold, Haurenherm joined another real estate firm, again as a salesman. Cardle took no action with respect to the commission allegedly owed to him by Haurenherm and by Reixach. It was not until 1983 that Cardle reported the Goldberry Square transactions to the Registrar for Real Estate and Business Brokers.

Haurenherm insists that he never held himself out as a real estate broker or as self-employed while working in the subdivision and that throughout the period September 1979 to June 1981, he was an employee of Cardle as a salesman. He also swore that he believed that even though the arrangement with Cardle, as he understood it, was unusual, it did not contravene the Real Estate and Business Brokers Act because it had the approval of Cardle who was his employer and a registered real estate broker. He was dissuaded, he said, from putting things right when he found out that the method of operation was improper by Cardle himself, who thought it best to carry out the remaining sales under the agreed to arrangement.

It is regrettable that neither Humphrey nor Hemmer was available to give evidence which might have assisted the Tribunal in its deliberations.

All four registrants, involved directly or indirectly in the Goldberry Square sales, were experienced in the real estate business and knew or should have known the requirements of the Act governing their industry.

Whatever the motives and whatever the understanding between and among the parties, the fact remains that the provisions of the Real Estate and Business Brokers Act were breached, not just by Haurenherm, but by all of the registrants involved who chose to go along with the arrangement. From the evidence now before the Tribunal, it appears that all four registrants were ready to turn a blind eye to the requirements of the Act to take advantage of an opportunity and an arrangement where all personally benefited to some degree. It is indeed fortunate that no member of the public was injured by their actions and their disregard of the requirements of the Act.

However, the only applicant before the Tribunal is Haurenherm. In weighing and assessing the evidence, the Tribunal has come to the conclusion that Haurenherm saw an opportunity to advance his own financial interests and he entered into an arrangement with the builder which he knew or ought to have known was wrong and contrary to the Act. The Tribunal also believes that Haurenherm could not have carried on business in the manner that he did without the passive concurrence and in some cases, active participation of his colleagues in the venture.

A person should not be lightly deprived of his means of gaining a livelihood. The events leading to the complaint now before the Registrar took place several years ago. The Tribunal is not aware of any other complaints against the Applicant. The complained of actions of the Applicant, while showing a lack of integrity on his part, have not resulted in any fraud against the public. Whether there was a fraud against his former employer is in dispute and not an issue before this Tribunal. The Tribunal has no reason to believe that the past conduct of Haurenherm affords reasonable grounds for belief that he will not carry on business in the future as a real estate salesman in accordance with law and with integrity and honesty.

The evidence relating to Haurenherm's financial position was inconclusive. The Tribunal has no evidence before it to support the finding that the activities being carried on by Haurenherm now will result in contravention of the Act or Regulations.

Further, on the evidence before it, the Tribunal does not find that Haurenherm acted as a real estate broker within the meaning of the Real Estate and Business Brokers Act, nor did he falsely complete the renewal application.

Nevertheless, the Tribunal cannot overlook the fact that Haurenherm contravened the Act in the past as previously noted and a sanction is necessary by way of warning to the industry at large that such wrongdoing will not be tolerated.

The Tribunal has power to substitute its opinion for that of the Registrar. The issue now is whether it should do so. The evidence given under oath to the Tribunal which was not available to the Registrar leads it to the conclusion that it should.

Therefore by virtue of the authority vested in it under Section 9(4) of the Real Estate and Business Brokers Act, the Tribunal directs the Registrar to refrain from carrying out his Proposal to revoke Haurenherm's registration but instead to suspend the same for a period of four months commencing March 1st, 1986. At the end of the suspension period of four months, Haurenherm may apply for registration as a real estate salesman, and provided the Registrar is satisfied that Haurenherm has taken the current mandatory Introduction to Real Estate courses now required to be taken by all persons prior to initial registration as a real estate salesperson and successfully passed the required exams related thereto, the Registrar will grant registration to him. *

* Note: The above decision was appealed to the Supreme Court of Ontario (Divisional Court) by the Registrar of Real Estate and Business Brokers. The appeal had not been concluded at the time of this publication.

DAVID W. JOHNSTON

APPEAL FROM A PROPOSAL OF THE
REGISTRAR OF REAL ESTATE AND BUSINESS BROKERS
TO REVOKE THE REGISTRATION

TRIBUNAL: STEPHANIE J. WYCHOWANEC, Q.C., CHAIRMAN, PRESIDING
HELEN J. MORNINGSTAR, MEMBER
M. JEAN WORMLEY, MEMBER

APPEARANCES:

B.P.R. EBY, representing the Applicant

STEPHEN P. MARTIN, representing the
Registrar of Real Estate and Business Brokers

DATE OF

HEARING: 30, 31 October 1986

Toronto

REASONS FOR DECISION AND ORDER

The events leading up to the Registrar's Proposal under the Real Estate and Business Brokers Act to revoke the registration of David W. Johnston can be said to have begun in August, 1981, when a major bank decided to promote and transfer a young Manager from Kitchener to Toronto. Mr. Legere, the young man in question, was reluctant to come to Toronto for a number of reasons, but it was made clear to him by his superiors that if he wished to continue his very successful career with the bank, he had no choice.

The Legeres, although not familiar with the Toronto area housing market, decided that they would buy a house instead of renting accommodation. To assist in the search for a new home, several realtors offered their services to Mr. Legere and his wife, however, initially they only dealt with two salespersons, one from Canada Trust, a Mary Boudreau, the other, Ruth Griffith from Royal Trust. Ms. Boudreau showed the Legeres several houses, but according to Mr. Legere, they were all too expensive. In the following week, she again showed several other houses, but although they were cheaper, they were not acceptable to the Legeres. During this period, Mr. Legere was living in an expensive hotel in Toronto at his employer's expense and it appears that some pressure was being put on him to get fully settled as quickly as possible.

Mr. Legere, therefore, began looking for property on his own. Ms. Boudreau had earlier shown him a house at 87 Meadowvale Road in Scarborough, which had been listed for sale by Royal Trust on a multiple listing basis. The Legeres liked the house but thought that, at \$175,000, it was too expensive, in fact, overpriced. According to Mr. Legere, Ms. Boudreau had suggested presenting an offer at \$165,000, which was well above Mr. Legere's self-imposed limit of \$157,000.

By the fourth week, the Legeres were tired of looking so they reconsidered the Meadowvale property. By this time, according to Mr. Legere, he had lost confidence in Ms. Boudreau because she did not appear to be generally knowledgeable, could not answer several questions about the Meadowvale property, and apparently was unwilling or unable to find the answers elsewhere. Nevertheless, Mr. Legere instructed her to prepare an offer on the Meadowvale house for \$151,000 and to forward it to him in Kitchener for further consideration. This was done.

It is now necessary to pick up another thread of what eventually turned out to be a very tangled web. While Mr. Legere was still posted in Kitchener, he met and became quite friendly with a man many years his senior who had been in the real estate business for many decades. This man was David W. Johnston, the Applicant in this hearing. Although working in Toronto, Mr. Legere travelled back to Kitchener from time to time because he still had unfinished business there. He told Mr. Johnston of his difficulties in finding a suitable house. It is not clear whether Mr. Legere asked Mr. Johnston to do some checking for him or whether Mr. Johnston offered to help on his own. What is clear is that Mr. Johnston did go to Toronto on more than one occasion and did check out the Meadowvale property and the surrounding area, as well as other properties.

The exact sequence of events thereafter is not clear from the evidence. We know that Ms. Boudreau drew up an offer for \$151,000 and that later that offer was amended by Mr. Legere by striking out the name of Canada Trust and inserting Mr. Johnston's name as selling agent. We also know that Mr. Legere told Ms. Boudreau that he had no further use of her services and that he was prepared to give her \$500 for past efforts, which she refused.

According to Mr. Legere, he discussed the Boudreau offer with Mr. Johnston and had told him of his problems with the selling price. Mr. Legere did not think the offer at

\$151,000 would be accepted by the vendors and he felt there was little point in presenting it. He said that Mr. Johnston told him that he, Johnston, would present the offer and that he would get the house at about \$157,000 which was the maximum price that Mr. Legere was prepared to pay. Mr. Legere also testified that Mr. Johnston had assured him that if the vendors insisted on a higher price, Mr. Johnston would be flexible on his commission so that all the Legeres would actually pay for the house would be \$157,000. Mr. Legere said he expected to get some money back from Mr. Johnston if he had to pay more for the house initially. On this basis, Mr. Legere decided to go with Mr. Johnston.

Mr. Legere said that, although he had some reservations, he changed the name of the selling agent on the offer at the direction of Mr. Johnston and after consulting with two solicitors as to the legality of this action. The offer was submitted at \$151,000, returned at \$169,000 and finally countersigned at \$159,000. Mr. Legere said that at no time did Mr. Johnston see the original or amended offer. When the offer was countersigned at \$159,000 without consultation with Mr. Johnston, he, Legere, personally got in touch with Ms. Griffith, the salesperson at Royal Trust to tell her that that was the final offer. The offer was accepted at this price and in due course, the purchase was completed.

Mr. Johnston's recollection of many of these events is markedly different. He testified that he had scouted the housing market in and around Toronto, looking for a house for the Legeres in the \$120,000 range close to the GO Train. He said that he could not find anything in that price range that met the stated needs of Mr. Legere. He was told of the Meadowvale property and he again came to Toronto to make inquiries about that house in particular and about the price of houses being constructed nearby which evidently were in the \$200,000 range. After he returned to Kitchener, he told Mr. Legere that if he liked the Meadowvale property, Mr. Legere should make an offer at a price he thought reasonable given all the circumstances. He did not tell Mr. Legere what price would be suitable.

It was at this time that Mr. Legere told Mr. Johnston that he already had asked Ms. Boudreau to prepare the offer at \$151,000, but that he was not satisfied with Ms. Boudreau and did not expect that the offer would be accepted. The issue of traffic flow and possible street widening was raised, and Mr. Johnston went back to Toronto to get that information. By then, according to Mr. Johnston, it was his third or fourth

trip to Toronto, and he said he was reluctant to spend any more time on Mr. Legere's needs. When he reported back to Mr. Legere, he was told that Ms. Boudreau had been discharged and he was asked to act as Legere's agent.

Before doing anything further, Mr. Johnston said he first spoke with Ms. Griffith to see if there were any objections to his acting on the sale since he did not belong to the Metropolitan Toronto Multiple Listing Service. After being assured that there would be no problems, he was ready to draw up a new offer. When he telephoned Mr. Legere to tell him this, he found that the Boudreau offer had been amended and already sent to Ms. Griffith for presentation to the vendors.

Mr. Johnston emphatically denied that commission was ever discussed with Mr. Legere, let alone any arrangement whereby part of the commission might be turned back to Mr. Legere.

In due course, Ms. Griffith advised Mr. Johnston that the offer had been accepted and Mr. Johnston then waited for his commission.

Some time after the purchase had been completed, Mr. Johnston, after many inquiries, was told that the commission to which he felt entitled, having persuaded Mr. Legere to proceed with the offer, had been paid to Canada Trust and presumably Ms. Boudreau. He then commenced an action against Royal Trust for its recovery. Royal Trust joined Canada Trust which in turn added Mr. Legere as the Fourth Party to the action, alleging that Mr. Legere had 'conspired' with Mr. Johnston to deprive Canada Trust of the commission due and owing to it.

When Mr. Legere was served with the Fourth Party Notice, he was horrified. Canada Trust had already complained directly to his employer about his 'business ethics' and he did not want any further problems. He consulted with his lawyer and was advised to defend the action. However, Mr. Legere first telephoned Mr. Johnston to find out what was going on. According to Mr. Legere's testimony, Mr. Johnston told him that he, Johnston, was only trying to scare the defendant, that the action would not go to trial, and that Legere would not be involved. Mr. Legere said that from this conversation, he expected that if a settlement was reached, Mr. Johnston would protect him since he was Johnston's client. Based on these assurances, Mr. Legere decided not to defend the action. Mr. Legere said that he couldn't believe that a court could rule against him on the merits. Nevertheless a judgment for some

\$6,500 was obtained against him. When he was threatened with garnishment proceedings, Mr. Legere paid \$3,000 to Canada Trust and then asked Mr. Johnston for some money back. Mr. Johnston refused.

Mr. Legere was very upset about the whole transaction. He described his feelings as "going through two to three years of misery". He felt embarrassed and that he had been 'shafted'. He felt that he, a purchaser, had ended up paying Mr. Johnston's commission. He then complained to the Ministry about Mr. Johnston's actions. These complaints are the basis for the Registrar's Proposal to revoke the registration.

Mr. Johnston's version of the events surrounding his legal action against Royal Trust is different. He told the Tribunal that after he failed to receive his commission, he sued Royal Trust for it. He said that Mr. Legere called him after he had been served with the Fourth Party Notice and had asked Mr. Johnston to withdraw his action. Mr. Johnston refused to do this and he advised Mr. Legere not to ignore the Fourth Party Notice but to attend to it. Mr. Johnston denied that he said or did anything which could have lulled Mr. Legere into taking no action on the Notice.

Mr. Johnston said that his claim never went to trial because, on the advice of his solicitor, he reluctantly settled for \$2,000. The possible effect on Mr. Legere of this settlement was not considered. According to Mr. Johnston, he was reluctant to settle out of court because he felt that a settlement would reflect badly on his reputation, however, he could not continue incurring legal expenses to pursue his claim.

The Registrar, after receiving Mr. Legere's complaint and after meeting with Mr. Johnston issued his Proposal. In the Proposal, the Registrar stated that Mr. Legere "relied to his detriment on the advice and assurances given to him by Johnston". The Registrar also stated that he believed that "the Legeres were not allowed, because of Johnston's assurances, to properly defend themselves". Although the Registrar took into account that Legere ought to have defended the action against him, the Registrar did not think that this error excused the conduct of Mr. Johnston. It was the Registrar's conclusion that the past conduct of Mr. Johnston in this matter afforded reasonable grounds for belief that Mr. Johnston would not carry on business in accordance with law and with integrity and honesty, within the meaning and contemplation of Section 6(1)(b) of the Real Estate and Business Brokers Act.

When questioned, Mr. Cook, the Assistant-Registrar, said that the reason the Proposal was issued was that a dispute over commission had, as he put it, "overflowed to the public". It was his position, as the Tribunal understands it, that Mr. Legere's interests should have been better protected by his agent, Mr. Johnston, that Mr. Johnston had guided Mr. Legere incorrectly, and that by allowing his own case to proceed, Mr. Johnston failed to look after his client. The Registrar does not rely on any one incident to support his conclusion, but on the cumulative effect of all of Mr. Johnston's alleged actions in what was described as a "not straight forward real estate transaction".

There are three separate incidents which have attracted the Registrar's notice. The first relates to the issue of "flexibility" on commission. The evidence on this issue was contradictory. Mr. Legere testified that he understood that he would get back half the commission payable to Mr. Johnston if the purchase price of the house was over \$157,000. Mr. Johnston denies that commission was discussed at all. The main reference to commission in the Exhibits is in Exhibit 9, which was prepared by Ms. Boudreau, wherein she states that Mr. Legere had told her that a real estate broker was going to present the offer for nothing and that he, Mr. Legere was going to save \$4,500, and in Exhibit 10, which is in essence Mr. Legere's response through his employer to Ms. Boudreau's complaint, wherein it states that Johnston indicated a willingness to negotiate a portion of his commission. This Exhibit speaks of \$500 to \$1,000. To say the least, Mr. Legere's understanding of the commission issue has not been consistent. The Tribunal, having weighed the testimony of both Mr. Legere and Mr. Johnston believes that there may have been some discussion between them about commission, but that Mr. Legere either misunderstood the discussion or that his recollection of the discussion is not clear.

The second incident relates to the changes made to the offer wherein Mr. Legere substituted Mr. Johnston's name for that of Canada Trust. The alleged inducement to change agents is the commission pay back promise. The Tribunal, as already stated, does not believe that Mr. Johnston had agreed to return all or part of his commission to Mr. Legere if he was the agent for the latter on the purchase of the Meadowvale property. There is no allegation that the act of changing the agent's name in itself was illegal. Indeed, Mr. Legere appears to have consulted with two lawyers before he did so and he was apparently advised by both that, although it would be better to prepare a new offer, the substitution was acceptable if he wished to change agents.

The third incident relates to the action commenced by Mr. Johnston against Royal Trust. Could or should Mr. Johnston have known that Mr. Legere would be added as a Fourth Party when he commenced the action? Could or should Mr. Johnston have known, that having been joined, Mr. Legere would do nothing to defend the action against him? If the answer to both these questions is 'Yes', is there an absolute onus on Mr. Johnston to protect Mr. Legere in these circumstances, at his own expense, if necessary? In the specific circumstances of this case, the Tribunal believes the answer to the last question must be 'No'.

Mr. Legere sought out the advice of his own solicitor and then chose to ignore it. He chose to do nothing because he could not believe that any court would ever find against him, even if he failed to put in an appearance, and because he says that Mr. Johnston assured him that he would not be involved. The Tribunal has contradictory evidence as to the extent, if any, that assurances were given by Mr. Johnston. The Tribunal believes, however, that the primary or main reason that Mr. Legere declined to take action was his own unshakable belief that no judgment could be signed against him regardless of what happened. He was in no way "not allowed" by Mr. Johnston from defending himself.

The Act does not specifically spell out the duty owed by a real estate broker or salesperson to a purchaser. The Tribunal accepts that implicitly there is a duty on the registrants to advise the purchaser of all the known facts related to a property so that the purchaser can make an informed decision whether to buy or not, and further, not to act knowingly or recklessly to the detriment of a purchaser before, during, or after the purchase of property has been completed. The Tribunal believes there must also be a corresponding duty on the purchaser to act reasonably and responsibly.

The Tribunal agrees entirely with the Registrar that disputes over commission as between real estate salesmen or brokers ought not to overflow to involve the public which, of course, includes the vendor or purchaser involved in the transaction giving rise to the commission.

However, the Tribunal does not think that the duty on the agent extends to prohibit an agent, acting in good faith, from applying to the courts for redress on the off chance that the public may through the actions of another party become involved at some later date. Nor does the Tribunal believe

that there is a duty on the agent to abandon his claim if a member of the public is added as a party to the action by someone else.

Mr. Johnston is 79 years old and semi-retired. He has been involved in the real estate industry for some three decades. There is no record of any impropriety during that period. The Tribunal was impressed with Mr. Johnston's knowledge of the industry and the governing Act. Although not working full time, Mr. Johnston has clearly kept up with developments in the industry and has strong views about some of the practices. In general, the Tribunal was left with the understanding that Mr. Johnston is a proud man who greatly values his independence and reputation in the community and that he would do nothing which might jeopardize either.

The Tribunal has carefully weighed the evidence, and, in this case, has come to the conclusion that Mr. Johnston will not put the public at risk in the future. It has also concluded that his past conduct, which includes the regrettable chain of events surrounding the purchase of the Meadowvale property, is not such as to afford reasonable grounds for belief that in future he will not carry on business in accordance with law and with integrity and honesty.

Therefore, by virtue of the authority vested in it under Section 9(4) of the Real Estate and Business Brokers Act, the Tribunal directs the Registrar not to carry out his Proposal.

By way of obiter dicta, the Tribunal feels compelled to comment on the action of Canada Trust and Ms. Boudreau in particular. As noted earlier, Canada Trust, as a result of the dispute over the commission wrote to Mr. Legere's employer and impeached the former's business ethics. The Tribunal, as stated before, agrees with the Registrar that an argument over commission as between agents should not overlap to the public. In an appalling breach of that principle, Canada Trust complained about a purchaser directly to his employer. The Tribunal has no doubt that this action has caused Mr. Legere irreparable harm. On the information before it, the Tribunal can only form the opinion that this was the deliberate intention of Canada Trust. If this is the case, there is a clear lack of integrity shown on the part of Ms. Boudreau, her supervisor and principle broker. This type of action, whatever the provocation, should be strongly discouraged. The Tribunal has no jurisdiction to require the Registrar to make further investigation into this matter, however, it does recommend to the Registrar, that he review this aspect of the evidence in full in order to satisfy himself that no further action is required.

NICHOLAS MALHAM

APPEAL FROM A PROPOSAL OF THE
REGISTRAR OF REAL ESTATE AND BUSINESS BROKERS
TO REFUSE REGISTRATION

TRIBUNAL: MARY JANE BINKS RICE, Q.C., VICE-CHAIRMAN, PRESIDING
HELEN J. MORNINGSTAR MEMBER
FREDERICK H. SHERWOOD, MEMBER

APPEARANCES:

LAWRENCE GREENSPON, representing the Applicant

STEPHEN A. AUSTIN, representing the Registrar of
Real Estate and Business Brokers

DATES OF 19 April 1985
HEARING: 7 June 1985

Ottawa
Toronto

REASONS FOR DECISION AND ORDER

The Applicant, Nicholas Malham, has appealed to the Tribunal from a Proposal of the Registrar dated October 19th, 1984, to refuse registration to him as a salesman under the Real Estate and Business Brokers Act, R.S.O., 1980, Chapter 431.

In the Proposal, the Registrar indicated that it was the opinion of the Registrar that the past conduct of the Applicant afforded reasonable grounds for belief that he would not carry on business in accordance with law and with integrity and honesty. As to particulars of the conduct, the Registrar alleged that the Applicant had a criminal record for several convictions between the period of January 27, 1981 and January 27, 1982 and would be under probationary supervision until March 3, 1988. The Registrar served the Applicant with a Notice of Further Particulars, dated April 9th, 1985, alleging by way of further particulars that the Applicant furnished false information by failing to provide the Registrar with full particulars concerning his criminal record.

At the hearing, the Ministry led evidence through Sergeant Richard Ralph of the Ottawa Police Department, that was not contradicted by the Applicant, that the Applicant had pleaded guilty in Provincial Court (Criminal Division) to the following criminal offences:

- (i) January 27, 1981 - keeping a common gaming house, contrary to section 185(1) of the Criminal Code for which he was fined \$300.00 or 14 days incarceration, in default;
- (ii) August 18, 1981 - Break, Enter and Theft, contrary to section 306 of the Criminal Code for which he received a suspended sentence and probation for twelve months;
- (iii) September 1, 1981 - Break, Enter with intent contrary to section 306(1)(a) of the Criminal Code for which he received twelve months incarceration;
- (iv) September 25, 1981 - (a) one count of possession of stolen property, contrary to section 312(1)(a) of the Criminal Code; (b) Harboursing a person While Unlawfully at Large, contrary to section 421(b) of the Criminal Code; for which the applicant was sentenced to three months incarceration on each charge consecutively, and consecutively to the sentence being served.
- (v) September 29, 1981 - Obstructing Justice contrary to section 127(2) of the Criminal Code, for which the applicant was sentenced to a term of thirty days incarceration consecutive to the sentence being served.
- (vi) January 27, 1982 - Conspiracy to commit arson for which the applicant was sentenced to a term of five years incarceration consecutive to the sentence being served.

Sergeant Ralph indicated that the Applicant was co-operative throughout his experience with him, and that he was a personable fellow, a "likeable lad". The Sergeant further added that the Applicant to his knowledge was always involved in the criminal element.

The Registrar of the Real Estate and Business Brokers Act, Alan Coleclough, testified. He indicated that Exhibit 8, filed at the hearing, which was the application for

registration, did not disclose all the offences for which the Applicant had been convicted, in that it omitted the convictions for keeping a common gaming house, one of the counts of Break, Enter and Theft, and the convictions of possession of stolen property. The Registrar testified that he had some concern that the Applicant was attempting to conceal a portion of his criminal record. In summary, however, the Registrar felt, based on the record of conviction of the Applicant, that the registrant was unsuitable whether or not he was attempting to conceal his record and whether or not he had only been convicted of those offences set out in Exhibit 8. The Registrar felt it was very important for a proper administration of the Act that the public perceive only "suitable" people to be registrants. Mr. Coleclough stated that it would be of some concern to the public if a person was admitted to a position of trust after having committed seven serious offences and that person was still on parole.

Mr. Malham testified in his own behalf. He impressed the Tribunal as bright, personable and contrite as to his past behaviour. He indicated that he had gone through a "stupid" period of attempting "to impress everybody and playing the high flyer". The Applicant appeared optimistic about the future.

In addition to the Applicant's own testimony, the Tribunal heard testimony from the Applicant's present employer, with whom the Applicant has earned a reasonably lucrative position, that the Applicant has a position of considerable trust in that he personally deals with a large monthly rental deposit for that company. The Tribunal was further informed by a real estate broker, Frank de Franco of De Franco Real Estate Ltd., who has been an agent since 1965, that the Applicant would have a very good future in real estate. Several other business people testified that they would have no reservation in dealing with the Applicant as a real estate salesman, notwithstanding the fact each witness was aware of the Applicant's criminal record. The Applicant also called on his behalf Ward Adams of the John Howard Society, who indicated that he had contacted the Ministry and that the Ministry had indicated to him that a person with the Applicant's criminal record might well be granted registration and that such a record would not afford a refusal per se. It was on the basis of this contact that the Society granted the Applicant funds to enroll in the real estate brokers course in which the Applicant was apparently very successful.

In argument on behalf of the Applicant, it was submitted that non-disclosure was certainly a "red herring" and not a serious contention by the Ministry in that the Applicant

had indicated his inmate number on his application; had indicated the most serious offences for which he had been convicted; and had disclosed an offence for which he had never been convicted.

Secondly, it was argued by counsel for the Applicant that the doctrine of estoppel should be considered in that the Ministry had indicated to the John Howard Society that an Applicant on parole with a record of convictions which included arson would not necessarily be refused registration. It was on this information that the Applicant had enrolled in the real estate course.

The main argument of the Applicant, however, was devoted to the grounds explicitly set out in the original proposal, i.e. that the past conduct of the Applicant affords reasonable grounds for belief that he will not carry on business in accordance with law and with integrity and honesty. Counsel argued that the Tribunal should view the past misconduct as a single period in an otherwise law abiding life. Further, that while it was, of course, the Applicant's intention to be honest in all respects, what we should be considering most carefully was whether it was reasonable to assume that the Applicant would carry on business, as distinct from the rest of his life, with honesty. Counsel for the Applicant pointed to Mr. Malham's employment with Controlex since November, 1984, as well as the fact that he had been on parole for thirteen months without difficulty, as evidence to demonstrate the Applicant's intention to carry on his business dealings in the future with honesty.

Although not the main thrust of Mr. Greenspon's submissions, he did suggest to the Tribunal that a refusal to register the Applicant was placing the Applicant in double jeopardy in that he was being punished again for the crimes for which he was previously incarcerated.

Counsel for the Registrar submitted that notwithstanding all the submissions of counsel on behalf of the Applicant that the Tribunal must always bear in mind what the test should be of the proposal before it. Mr. Austin strongly suggested to the Tribunal that the Tribunal should only refuse the proposal if the Registrar is in error - in other words, if the past conduct of the Applicant does not afford reasonable grounds that he will not carry on business in accordance with law and integrity and honesty.

Mr. Austin cautioned the Tribunal against a preoccupation of whether or not the Applicant was reformed. In dealing with the additional particulars of Exhibit 6, counsel for the Registrar suggested it was virtually impossible for the Applicant to have unintentionally omitted three convictions. Counsel therefore suggested that the Registrar had an additional reason to refuse to register respecting the Applicant's intention to mislead.

At the outset, the Tribunal would like to indicate that it finds no intention on the part of the Applicant in omitting three convictions from his application to be registered, to mislead the Registrar. The Applicant clearly indicated the majority of his convictions and the most serious, as well as his inmate number. The Tribunal therefore draws no conclusions from the Applicant's omissions.

Moving on to what must be considered the main ground for the Registrar's refusal, i.e. the Applicant's past conduct, the Tribunal is of the opinion that its consideration is completely circumscribed by the decision of the Divisional Court of the Ontario Court of Appeal, referred to in the Summaries of Decisions, in the appeal by the Registrar of Motor Vehicle Dealers and Salesman concerning the Tribunal's decision to refuse the Registrar's proposal in the case of Re: Richard Brenner Vol. 12 (1983) p.53. In that decision, the Divisional Court stated:

The proper question at the rehearing remains, however, whether the past conduct of the applicant affords reasonable grounds for belief that he will not carry on business in accordance with law and with integrity and honesty. Unless the Tribunal can find that it does not, the Tribunal should not order the Registrar to refrain from carrying out his proposal.

Looking at all the evidence before us, the Tribunal is of the opinion that the Registrar was not in error. Accordingly and by virtue of the authority vested in it under section 9(4) of the Real Estate and Business Brokers Act, the Tribunal directs the Registrar to carry out his proposal. *

*Note: The above decision was appealed to the Supreme Court of Ontario (Divisional Court) by Nicholas Malham. The appeal had not been concluded at the time of this publication.

RAYMOND J. O'DONNELL

APPEAL FROM A PROPOSAL OF
THE REGISTRAR OF REAL ESTATE AND BUSINESS BROKERS
TO REFUSE TO GRANT REGISTRATION

TRIBUNAL: MATTHEW SHEARD, Q.C., VICE-CHAIRMAN PRESIDING
KENNETH VAN HAMME, MEMBER
FREDERICK SHERWOOD, MEMBER

APPEARANCES:
STEPHEN I. GOLDBERG, representing the Applicant
STEPHEN A. AUSTIN, representing the Registrar under
the Real Estate and Business Brokers Act

DATE OF
HEARING: 11 February 1986 Ottawa

REASONS FOR DECISION AND ORDER

Section 6(1)(b) of the Real Estate and Business
Brokers Act, R.S.O. 1980, Chapter 431 reads as follows:

An applicant is entitled to
registration or renewal of registration
by the Registrar except where,

.....
(b) the past conduct of the applicant
affords reasonable grounds for belief
that he will not carry on business in
accordance with law and with integrity
and honesty...

Section 8(1) reads as follows:

Subject to section 9, the Registrar may
refuse to renew an applicant where in the
Registrar's opinion the applicant is
disentitled to registration under section
6 or 7.

Section 9(4) of the Act reads in part as
follows:

Where an applicant or registrant
requires a hearing by the Tribunal...the
Tribunal...may by order direct the

Registrar to carry out his proposal or refrain from carrying out his proposal and to take such action as the Tribunal considers the Registrar ought to take in accordance with this Act and the regulations, and for such purposes the Tribunal may substitute its opinion for that of the Registrar.

The issue before the Tribunal in this case has been the suitability of the Applicant for registration as a salesman in the real estate industry.

He comes before us as one who has been stripped of his registration as a salesman in the motor vehicle industry on the basis of a finding of fact contained in a decision of the Tribunal in a previous hearing that he was a person whose "past conduct affords reasonable grounds for belief that he will not carry on business with integrity and honesty".

There was no direct evidence that he was a person "whose past conduct affords reasonable grounds for belief that he will not carry on business with integrity and honesty". There was no direct evidence that he had spun odometers or even known that odometers were being spun in a dealership conducted by him (nor was there evidence that he didn't). But he ought to have known. The company operated by him pleaded guilty to 10 charges of that offence under the Criminal Code of Canada. He also delegated authority to a person he ought to have known was totally unfit for such delegation thereby putting the public interest at risk. That person was not in possession of registration as required by law. He also left documents signed in blank with that individual in an unlawful manner which also set the public interest at risk and indeed members of the public purchased automobiles whose odometers had been set back and were therefore, in our opinion, harmed, although Mr. O'Donnell denies that they were.

Mr. O'Donnell's wife Trudy is employed as a registered real estate salesperson in a real estate brokerage firm operated by Mr. and Mrs. MacDonald whom we believe to be admirable people and whose business we imagine is an excellent one. They have offered Mr. O'Donnell employment and have demonstrated great faith in him as well in his honesty and integrity and also their belief in the likelihood that he will behave properly in the future if registered as a real estate salesman.

The Registrar of Real Estate and Business Brokers does not share the confidence of Mr. and Mrs. MacDonald in him however.

Nor do the members of this Tribunal. Mr. O'Donnell refuses to admit that the events leading to the revocation of his registration as a motor vehicle salesman were the result of anything more than a mistake in judgment on his part at the worst, or than the misdeeds of a person or persons other than himself. But in our view he was grievously at fault in the unhappy circumstances leading to the revocation of his registration as a motor vehicle salesman and his failure to admit or concede this amounts to a possible inability on his part to perceive the difference between right and wrong.

This would, in our view, be potentially very dangerous from the standpoint of public interest were he to be given opportunity to do harm to the public, by either direct or indirect means or by act, omission or commission as a registered real estate salesman. For example, if Mr. O'Donnell perceives that there is nothing wrong in signing contract forms in blank and leaving these with a subordinate when departing upon a trip (a subordinate who was not registered and ought not to have been employed by him in the first place) then we believe his attitude, as well as his past conduct, are not such as to afford reasonable grounds for belief that he will carry on business with integrity and honesty.

We believe that one who has done wrong and admitted his wrongdoing and undertaken to reform himself offers better prospects for the future than the requirements of section 6(1)(b) of the statute will be met, than in the case of one whose attitude reflects no awareness of misconduct in the first instance.

We would not expect anyone to admit guilt or even vicarious fault if he did not believe himself to be at fault. If that failure to admit past fault, however, results from some inability to understand the requirements of law, then we, for our part, are unable to disagree with the conclusions of the Registrar or to direct the overruling of his Proposal.

Therefore by virtue of the authority vested in it under Section 9(4) of the Real Estate and Business Brokers Act the Tribunal directs the Registrar to carry out his Proposal.

THOMAS JOSEPH PEOTTO
(ALSO KNOWN AS FRANK THOMAS PEOTTO)

APPEAL FROM A PROPOSAL OF THE
REGISTRAR OF REAL ESTATE AND BUSINESS BROKERS
TO REFUSE TO RENEW THE REGISTRATION

TRIBUNAL: MARY G. CRITELLI, VICE-CHAIRMAN, PRESIDING
BARBARA NICHOLS, MEMBER
FREDERICK SHERWOOD, MEMBER

APPEARANCES:
STUART B. SCOTT, representing the Applicant
MICHAEL W. BADER, representing the
Registrar of Real Estate and Business Brokers

DATE OF
HEARING: 17, 18 September 1986 Toronto

REASONS FOR DECISION AND ORDER

This hearing was held pursuant to Section 9(2) of the Real Estate and Business Brokers Act in order to review the Proposal of the Registrar made pursuant to Section 9(1) of that Act to refuse to renew the registration of Thomas Joseph Peotto (also known as Frank Thomas Peotto) as a real estate broker.

Mr. Peotto is 58 years of age and was first registered as a salesman under the Act in 1953. He became a broker in 1957. He was President and shareholder, together with his wife, of Twin Gate Realty Limited, in Thunder Bay, Ontario from 1957 until April, 1983 when that Company's registration under the Act terminated.

Subsequently, he moved to the Toronto area and was a broker with A.E. Lepage Real Estate Services Limited from December 1983 to December 1984 and with Royal Lepage Real Estate Limited from December 1984 to April 1985. From April 1985 to the present, he has been a broker with Humber Valley Realty Ltd.

A lengthy Notice of Proposal was filed by the Registrar, however, many of the reasons set forth therein were abandoned by the Registrar at the commencement of and during the course of the hearing with the result that the Tribunal ultimately had to consider only one reason for the refusal to renew. The Registrar's reason for the Proposal was:

...that the past conduct of the registrant, Peotto, affords reasonable grounds for belief that he will not carry on business in accordance with law and with integrity and honesty, within the meaning and contemplation of section 6(1)(b) of the Act and, by reason thereof, it is the Registrar's opinion that the registrant, Peotto, is disentitled to renewal of registration under the Act.

The Particulars relied upon by the Registrar in support of this reason are that in his application for registration dated August 8th, 1983 (Exhibit 9) Peotto answered "No" to the question: "Are there any unpaid judgments outstanding against you?" In fact, as is now admitted by Mr. Peotto, this answer was false and there were the following five unpaid judgments outstanding against Mr. Peotto and filed with the Sheriff of the District of Thunder Bay as at the date of the said application:

<u>Plaintiffs</u>	<u>Defendants</u>	<u>Damages</u>	<u>Costs</u>	<u>Date Writ Received</u>	<u>Court & Writ No.</u>
Sun Alliance Insurance Company	Twin Gate Realty Ltd. and Frank Peotto	Taxed Costs \$3,738.00 less paid \$506.51 Interest from 2.5 1983 at 11.5%		6.5 1983	District 8685/83
Sun Alliance Insurance Company	Twin Gate Realty Ltd. and Frank Peotto	\$18,101.54 less paid \$2,542.06 Interest from 1.1 1983 at 11.5%		3.5 1983	District 8664/83

<u>Plaintiffs</u>	<u>Defendants</u>	<u>Damages</u>	<u>Costs</u>	<u>Date Writ Received</u>	<u>Court & Writ No.</u>
Royal Bank of Canada	Twin Gate Realty Limited, Thomas Joseph Peotto, a.k.a. Frank Peotto and West Fort William Credit Union Limited	\$27,137.73 less paid \$3,692.79 Interest at 11.5% from 15.4 1983		15.4 1983	Supreme 8580/83
Royal Bank of Canada	- " -	\$55,824.59 less paid \$7,616.68	150.32	15.4 1983	Supreme 8579/83
West Fort William Credit Union Limited	Frank Thomas Peotto	\$6,974.99 Interest from 16.3 1982 at 16.5%	91.10	22.3 1982	District 7196/82

While Mr. Peotto now admits that there were outstanding judgments against him as at August 8th, 1983, he denies knowledge of the judgments as at that date and denies any intention to mislead the Registrar.

The evidence of Mr. Peotto was that his Company, Twin Gate Realty Limited, got into serious financial difficulties when that Company purchased a small insurance business in 1982. Sometime thereafter, his wife refused to co-sign a renewal of his bank loan with the Royal Bank of Canada. Mr. Peotto testified that shortly thereafter, he was "shut down" by the Bank and, as indicated above, the status of Twin Gate Realty Limited as a broker was terminated as of April 19th, 1983.

With respect to the first four judgments referred to above, Mr. Peotto admits being served with a writ in each action and testified that on each occasion, he sought the advice of his solicitor at the time, Mr. Victor Jasparitsch who, at the relevant time, practised law in Thunder Bay and is now a real estate agent in that City. It was Mr. Peotto's testimony that on each occasion, Mr. Jasparitsch advised him that Twin Gate Realty Limited was the true debtor, and promised to "take care of" the matter insofar as Mr. Peotto personally was concerned. The Tribunal is advised that all

four of these judgments were obtained in default of defense. Mr. Peotto at no time took any steps to assure himself that Mr. Jasparitsch had taken steps to prevent the issuance of a personal judgment against Mr. Peotto.

With respect to the fifth judgment, where Mr. Peotto was the sole defendant named in the writ, which he admits being served with, that action arose as the result of a guarantee which Mr. Peotto signed, guaranteeing the debt of his former lawyer, Mr. Jasparitsch. Once again, Mr. Peotto testified that Mr. Jasparitsch promised to "take care of it".

Mr. Peotto also testified that he specifically sought Mr. Jasparitsch's advice, prior to submitting the application to the Registrar, as to how the questions on the application form ought to be answered. Mr. Peotto stated in evidence that Mr. Jasparitsch advised him to answer "No" to question 6.

The Tribunal has on many occasions stressed the importance of accurate and truthful disclosure in the application form submitted to the Registrar. The information contained in the application is basic to the formation by the Registrar of a judgment as to the Applicant's fitness for registration.

A false statement or a non-disclosure in an application is a very serious matter from which it can be easily inferred that the Applicant will not carry on business with integrity and honesty. However, as stated by the Tribunal in the *Coniam* (1983 C.R.A.T. 60) and *Leonard* (1985 C.R.A.T. 96) decisions, non-disclosure and falsehood in an application does not *ipso facto* lead to such a conclusion, nor does it automatically lead to disentitlement; there is still the exercise of judgment with respect thereto.

The Applicant has given an explanation for answering the question falsely. The Tribunal finds that the explanation given by Mr. Peotto is a poor one and that he failed to do everything he ought to have done to assure himself that he was providing the Registrar with accurate information. It is unfortunate that no evidence to support or contradict Mr. Peotto's sworn evidence was made available. Nonetheless, based on the evidence before it, the Tribunal is not prepared to make an order directing the Registrar to carry out his Proposal not to renew Mr. Peotto's registration. The Tribunal is of the view that in the circumstances of this case effective termination of Mr. Peotto's registration and ergo, his means of livelihood, would be unduly severe.

The Tribunal, therefore, by virtue of the authority vested in it under Section 9(4) of the Real Estate and Business Brokers Act, directs the Registrar to renew Mr. Peotto's registration and that the following conditions be attached to such registration:

1. That for a period of two years following the effective date of the renewal, Mr. Peotto shall not trade in real estate as a broker except as an employee of, and under the supervision and direct management of another registered broker;
2. That such supervising registered broker be provided with a copy of this Order and the Reasons of the Tribunal.

R. RUBY RICHMAN

APPEAL FROM A PROPOSAL OF THE REGISTRAR
OF REAL ESTATE AND BUSINESS BROKERS

TO REFUSE REGISTRATION

TRIBUNAL: MARY JANE BINKS RICE, Q.C., VICE-CHAIRMAN, PRESIDING
BARBARA J. SHAND, MEMBER
JAMES A. CATHCART, MEMBER

APPEARANCES:

R. RUBY RICHMAN, appearing on his own behalf

STEPHEN AUSTIN, representing the Registrar of
Real Estate and Business Brokers

DATES OF 8 January 1985
HEARING: 16, 17 April 1986

Toronto

REASONS FOR DECISION AND ORDER

R. Ruby Richman has applied for registration as a salesman under the Real Estate and Business Brokers Act, R.S.O. 1980, Chapter 431. The Registrar has issued a Notice of Proposal to refuse registration based on his opinion that the Applicant is not entitled to registration under section 6 of the Act, namely:

(a) having regard to his financial position, the applicant cannot reasonably be expected to be financially responsible in the conduct of his business; or

(b) the past conduct of the applicant affords reasonable grounds for belief that he will not carry on business in accordance with law and with integrity and honesty;

the particulars of which are set out in the Notice of Proposal.

The Applicant, who was a practising lawyer for nineteen years and a Queen's Counsel since 1975, was disbarred by the Law Society of Upper Canada on June 29th, 1981 for misappropriating client's trust funds. Six counts of theft over \$200.00 contrary to section 294(a) of the Criminal Code were laid against Mr. Richman, directly related to specific acts of the misappropriation, and he pleaded guilty to the six counts receiving a sentence on July 15th, 1982 of thirty months incarceration.

At the time of this hearing, there remain outstanding executions against the Applicant in the Sheriff's office of the Judicial District of York totalling \$462,186.07 exclusive of interest. Some of these Writs concern misappropriated amounts from clients who did receive full compensation from the Law Society of Upper Canada. There is, in addition, bearing in mind some duplication, a claim from the Law Society for reimbursement of approximately \$300,000.00 plus interest.

The Applicant in substance agreed with the facts set out in the Registrar's Proposal.

On October 4th, 1983, the Applicant submitted an application for registration as a real estate salesman and the Registrar served the Applicant with a Notice of Proposal dated December 13th, 1983.

From the period of the Applicant's release from prison to the present, he has held various employments including the position of Vice-President, Sports, for the World Masters Sport Foundation.

On March 17th, 1986, the Registrar served a Notice of Further Particulars to its original Proposal. The Tribunal ruled that these particulars were completely irrelevant and the Registrar withdrew his evidence in that regard.

It is not necessary for the Tribunal to dwell on the facts as set out in the Proposal by the Registrar as the essential facts are admitted by the Applicant. In addition to the evidence admitted by the Applicant at the outset, the Registrar called the former investigating officer, former Staff Sergeant Cowperthwaite, who gave evidence which aggravated the "bald facts" in that the Tribunal heard that certain individuals, who only received partial compensation from the Law Society, suffered intense financial hardship as a result of

the misappropriation. Mr. Geoffery Merritt, a practising Toronto lawyer, testified as to Mrs. Yolanda Paul's naivete and helplessness - she was a widow in her seventies who lost over one hundred thousand dollars to Mr. Richman, before she received compensation. The Registrar testified that his concern was generated by several facets - the length of time over which the misappropriation occurred; the amount of the theft involved; the lack of restitution in any real practical sense and the amount of the remaining indebtedness.

Mr. Richman testified on his own behalf, as did his wife and his prospective future employer. The Applicant, in the person of Mr. Richman, presented himself as an extremely intelligent, able, energetic and poised individual and the Tribunal was impressed with both the Applicant, and the recommendations filed with the Tribunal, and his employment since his release from prison. The Tribunal was also impressed with the Applicant's expressed attitude that he was determined to never again involve himself in the type of behaviour which led to his disbarment and prison term.

In argument, the Applicant forcefully submitted that his previous problems were an aberration in an otherwise positive life, and that having paid a very severe penalty for whatever he had done, he should be permitted registration as a salesman.

In opposition to the Applicant's submission, counsel for the Registrar submitted that we were limited to reviewing the Registrar's decision. (Re: Decision of the Divisional Court of the Ontario Court of Appeal, March 9th, 1983, Richard G. Brenner v. The Registrar of Motor Vehicle Dealers and Salesmen, unreported.) Counsel for the Registrar again outlined the lengthy scenario which led to the disbarment; a scenario which included an act of misappropriation after the Law Society auditors had frozen the Applicant's trust account. Counsel also emphasized the substantial indebtedness which, if not the paramount reason for the proposal, was of equal importance to the misconduct.

The Tribunal is of the opinion that a balance of the Applicant's right to a livelihood and the Registrar's duty to protect the public could be achieved in the following manner: that the Applicant be granted registration provided that he has made compensation as to any outstanding judgments or indebtedness to private individuals arising out of his theft, to the complete satisfaction of the Registrar.

We do not agree that we are limited to reviewing the reasonableness of the Registrar's decision. In reviewing the decision of the Registrar, the Tribunal is of the opinion that given all the circumstances, the Registrar's Proposal is reasonable. It is our opinion, however, that a better balance as to the protection of the public's interest and on the other hand, the Applicant's legitimate rights can be achieved by imposing as a condition to his registration the requirement as to restitution and compensation.

Accordingly by virtue of the authority vested in it under Section 9(4) of the Real Estate and Business Brokers Act, the Tribunal directs the Registrar not to carry out his Proposal provided the Applicant has paid any outstanding judgments or indebtedness to private individuals arising out of the theft, to the complete satisfaction of the Registrar. This requirement to compensate to the satisfaction of the Registrar is a condition precedent of the registration of the Applicant. If the Applicant fails to satisfy this condition on or before August 31, 1987, the Registrar is ordered to carry out his Proposal to refuse to register the Applicant.

TIKKA DATINDER SINGH SODHI

APPEAL FROM A PROPOSAL OF THE
REGISTRAR OF REAL ESTATE AND BUSINESS BROKERS
TO REVOKE REGISTRATION

TRIBUNAL: MARY G. CRITELLI, VICE-CHAIRMAN, PRESIDING
BARBARA J. SHAND, MEMBER
HARRY HAYES, MEMBER

APPEARANCES:

TIKKA DATINDER SINGH SODHI, appearing on his own behalf
A.N. MAJAINA, representing the
Registrar of Real Estate and Business Brokers

DATE OF

HEARING: 26, 27 August 1986

Toronto

REASONS FOR DECISION AND ORDER

This hearing was instituted at the request of Tikka Datinder Singh Sodhi, a salesman registered under the Real Estate and Business Brokers Act, pursuant to section 9 of that Act.

The purpose of the hearing was to consider whether the Tribunal should direct the Registrar of Real Estate and Business Brokers to carry out his Proposal as set out in his Notice of Proposal dated May 26th, 1986 (Exhibit 4) or whether the Tribunal should direct the said Registrar to refrain from so doing and to take some other action in accordance with the said Act and Regulations thereto.

The jurisdiction of this Tribunal to conduct this hearing and the relevant powers of the Tribunal with respect to this hearing are contained in Section 9 of the Real Estate and Business Brokers Act. As the Tribunal's jurisdiction and powers with regard to this matter are derived from and solely from the said Act, the Tribunal must be guided in the exercise of its jurisdiction and powers by the intent and purpose of this legislation. It is the view of the Tribunal that the primary purpose of the Act, which concerns itself with the regulation of real estate and business brokers and

salesmen, is the protection of the interests of the public. This view has been stated by the Tribunal many times.

Section 3 of the Act reads in part as follows:

3.(1) No person shall,

.....
(b) trade in real estate as a salesman unless he is registered as a salesman of a registered broker;

Section 6 of the Act reads in part as follows:

6.(1) An applicant is entitled to registration or renewal of registration by the Registrar except where,

(a) having regard to his financial position, the applicant cannot reasonably be expected to be financially responsible in the conduct of his business; or

(b) the past conduct of the applicant affords reasonable grounds for belief that he will not carry on business in accordance with law and with integrity and honesty;

Section 8 reads as follows:

8.(1) Subject to section 9, the Registrar may refuse to register an applicant where in the Registrar's opinion the applicant is disentitled to registration under section 6 or 7.

(2) Subject to section 9, the Registrar may refuse to renew or may suspend or revoke a registration for any reason that would disentitle the registrant to registration under section 6 or 7 if he were an applicant or where the registrant is in breach of a term or condition of the registration.

Section 9 reads in part as follows:

9.(1) Where the Registrar proposes to refuse to grant or renew a registration or proposes to suspend or revoke a registration, he shall serve notice of his proposal, together with written reasons therefor, on the applicant or registrant.

(2) A notice under subsection (1) shall inform the applicant or registrant that he is entitled to a hearing by the Tribunal if he mails or delivers, within fifteen days after the notice under subsection (1) is served on him, notice in writing requiring a hearing to the Registrar and the Tribunal, and he may so require such a hearing.

(3) Where an applicant or registrant does not require a hearing by the Tribunal in accordance with subsection (2), the Registrar may carry out the proposal stated in his notice under subsection (1).

(4) Where an applicant or registrant requires a hearing by the Tribunal in accordance with subsection (2), the Tribunal shall appoint a time for and hold the hearing and, on the application of the Registrar at the hearing, may by order direct the Registrar to carry out his proposal and to take such action as the Tribunal considers the Registrar ought to take in accordance with this Act and the regulations, and for such purposes the Tribunal may substitute its opinion for that of the Registrar.

(5) The Tribunal may attach such terms and conditions to its order or to the registration as it considers proper to give effect to the purposes of the Act.

(6) The Registrar, the applicant or registrant who has required the hearing and such other persons as the Tribunal may specify are parties to proceedings before the Tribunal under this section.

Mr. Sodhi is a registrant under the Act. The Proposal of the Registrar that this Tribunal must consider is a proposal to revoke Mr. Sodhi's registration. Paragraph 6 of the Notice of Proposal sets out the Registrar's Proposal as follows:

REGISTRAR'S PROPOSAL

PURSUANT TO SECTIONS 6 AND 8(2) OF THE ACT, BUT SUBJECT TO SECTION 9 THEREOF, THE REGISTRAR HEREBY PROPOSES TO REVOKE THE REGISTRATION OF THE REGISTRANT, SODHI, AS IT IS THE REGISTRAR'S OPINION THAT THE REGISTRANT, SODHI, IS DISENTITLED TO REGISTRATION AS A REAL ESTATE SALESMAN UNDER THE SAID SECTION 6.

The Reasons for the Registrar's Proposal are set out in paragraph 7 of the said Notice of Proposal as follows:

REGISTRAR'S REASON OR REASONS
FOR HIS PROPOSAL

(1) It is the Registrar's opinion that, having regard to his financial position, the registrant, Sodhi, cannot reasonably be expected to be financially responsible in the conduct of his business, within the meaning and contemplation of section 6(1)(a) of the Act and, by reason thereof, the registrant, Sodhi, is disentitled to continuation of registration as a real estate salesman under the Act.

(2) Further, or in the alternative, it is the Registrar's opinion that the past conduct of the registrant, Sodhi, affords reasonable grounds for belief that he will not carry on business in accordance with law and with integrity and honesty, within the meaning and contemplation of section 6(1)(b) of the Act and, by reason thereof, the registrant, Sodhi, is disentitled to continuation of registration as a real estate salesman under the Act.

The particulars relied upon by the Registrar are set out at great length in the Notice of Proposal and in the Notice of Further or Other Particulars which is dated August 11th,

1986 (Exhibit 4a). Briefly, the Particulars set out allegations, inter alia, to the effect that:

- (a) Mr. Sodhi has numerous unpaid judgments outstanding against him and against a Company of which he was President;
- (b) Mr. Sodhi has been convicted of criminal offences, including fraud, theft, false pretences, using the mails to obtain money by false pretences and driving while exceeding 80 milligrams in blood alcohol;
- (c) Mr. Sodhi was a party to bankruptcy proceedings commenced against him by one of his creditors;
- (d) Mr. Sodhi failed to disclose the said unpaid judgments, criminal convictions, and/or bankruptcy proceedings when applying for his registration and/or his renewal of registration as a real estate salesman;
- (e) Mr. Sodhi also failed to disclose on his renewal of registration as a real estate salesman the fact that he was carrying on a paralegal business under the trade name of Searchers Paralegal Services;
- (f) Mr. Sodhi was in the practice of using several aliases;
- (g) Mr. Sodhi had obstructed an investigation into a complaint made by one Elena De'Seta relating to Searchers Paralegal Services.

As Mr. Sodhi is a registrant under the Act and as he has requested a hearing by the Tribunal to consider the Notice of Proposal of the Registrar, his registration continues until a hearing has taken place and until the Tribunal, if it decides to direct the Registrar to carry out his Proposal, makes its order accordingly.

The proposed hearing dates of August 26th and 27th, 1986 were first conveyed to Mr. Sodhi's solicitors by letter dated June 13th, 1986, from the Registrar of this Tribunal (Exhibit 7-26). These dates were then officially set by the Appointment for and Notice of Hearing dated July 11th, 1986, also served on Mr. Sodhi's solicitors (Exhibit 2).

On August 26th, 1986, Mr. Sodhi attended before this Tribunal unrepresented by solicitors. The hearing before the Tribunal began with a motion for adjournment by Mr. Sodhi who

argued the motion for adjournment himself. The Registrar of Real Estate and Business Brokers advised the Tribunal through counsel that he would agree to the adjournment requested by Mr. Sodhi, if Mr. Sodhi would undertake not to act as a real estate salesman pending the new hearing date. Mr. Sodhi was not willing to give such an undertaking. While the Tribunal does not consider that there was any obligation whatsoever on Mr. Sodhi to give the undertaking requested as a condition of the adjournment, the fact remains that without such an undertaking Mr. Sodhi would be entitled to continue to trade in real estate and carry on the activities permitted to a real estate salesman until the new hearing date.

The adjournment requested by Mr. Sodhi was refused and the following oral reasons for the refusal were delivered by the Tribunal at the conclusion of the motion:

The motion the Tribunal has been considering all morning is one for an adjournment. The motion was made by Mr. Sodhi and is based on three grounds: firstly, that he wishes to be represented by counsel, in particular, Mr. Vasan who is not available to be present at the hearing today; secondly, that the Registrar of Real Estate Brokers has failed to provide him with full particulars of the allegations against him and a fair exchange of documents; and, thirdly, that there is an application for judicial review that has been served on the Tribunal that requests, *inter alia*, an order in the nature of prohibition restraining this Tribunal from proceeding with the hearing.

Dealing firstly with the third ground, the Tribunal was referred to the Decision of the Ontario Court of Appeal in the case of Re: Cedarvale Tree Services Ltd. and Labourers' International Union of North America, Local 183, 22 D.L.R. (3d) 40. At page 49 of that report, Mr. Justice Arnupp states: "It is also clear law that such a Tribunal is not required to bring its proceedings to a halt merely because it has been served with a notice of motion for an order of certiorari or prohibition. It is entitled, if it thinks fit, to carry its

proceedings forward until such time as an order of the Court has actually been made prohibiting its further activity or quashing some order already made by which it assumed jurisdiction." Accordingly this Tribunal considers that the fact that there is an application now before the Courts is not sufficient grounds for an adjournment of this proceeding.

Dealing with the second ground, there appear to be five documents in question. Firstly, the December 5th, 1985, formal complaint of Elena De'Seta. This was provided to the Applicant yesterday and although there is some dispute as to what occurred, there is some indication that it was proffered by the Registrar of Real Estate Brokers at an earlier time to Mr. Sodhi. It is a short one page document and the Tribunal considers that Mr. Sodhi has had ample time to review it insofar as preparation for this hearing is concerned.

Secondly, there is the March 24th, 1986 complaint that is referred to in the Registrar's Notice of Proposal. The Registrar has been unable to locate such a document and in fact it appears that the reference to the March 24th, 1986, date may be an error. If the document referred to cannot be produced, then the complaint referred to in the Notice of Proposal cannot be relied upon in its present form and accordingly Mr. Sodhi is not prejudiced by the failure to produce the document if it does exist. However, it appears it does not exist.

Thirdly, the Invoice of September 17th, 1985. Mr. Sodhi has a copy of the Invoice but wants to inspect the original. No explanation of the significance of the Invoice has been advanced to the Tribunal. The Tribunal is of the view that Mr. Sodhi ought to be given an opportunity to inspect the original, however, the failure of the Registrar to provide it thus far does not

afford ground for adjournment. We would, however, ask the Registrar to make it available to Mr. Sodhi as soon as possible during the course of the hearing.

Fourthly, the investigative report of Mr. Reese. The Tribunal finds that the Registrar is not obliged to produce this report and relies on the Decision of the Divisional Court in the case of Re: Keller and the College of Physician's and Surgeons reported at 17 O.R. (2d) 516.

Fifthly, there is the note that was allegedly attached to the original application for registration under the Act. As yet, this has not been located. Accordingly, it cannot be produced by the Registrar. An adjournment will not assist Mr. Sodhi in this regard.

The Tribunal is of the view that the material set out in the Notice of Proposal and the copies of documents provided to Mr. Sodhi in advance of the hearing set out with sufficient particularity the case with which Mr. Sodhi has to meet.

With respect to the unavailability of counsel, the Notice of Hearing setting out the August 26th, hearing date was served sometime within a few days of July 11th, 1986. Mr. Vasan apparently was not available on August 26th and chose not to rearrange his affairs so that he could be available. Mr. Vasan called Mr. Sodhi upon receipt of the Notice, so that Mr. Sodhi has had ample time to arrange for other counsel to represent him at this hearing if he so desired.

With respect to this ground, the Tribunal also notes that Mr. Sodhi has thus far demonstrated a high degree of competence in presenting his case, and in particular, he has sufficient competence to prepare the Notice of Application for Judicial Review (marked as Exhibit 3E).

The Tribunal also notes that Mr. Sodhi has been actively involved in most of the preparatory work for this hearing, including numerous attempts to obtain all the documentation which he felt would be necessary in order to prepare adequately.

The Tribunal also has uppermost in its mind its responsibility to protect the public interests and it is in the interest of the public that this hearing proceed with due dispatch.

Finally, the Tribunal refers to section 21 of the Statutory Powers Procedures Act which provides:

21. A hearing may be adjourned from time to time by a Tribunal of its own motion or where it is shown to the satisfaction to the Tribunal that the adjournment is required to permit an adequate hearing to be held.

It has not been shown to the satisfaction of the Tribunal that an adjournment is required in order to permit an adequate hearing to take place and, accordingly, the hearing will proceed.

While the Tribunal was delivering its Reasons with respect to the request for adjournment, Mr. Sodhi interrupted the Tribunal and took issue with the Tribunal's statement that he, Mr. Sodhi, had been advised of the date set out in the Notice of Hearing when his solicitor Mr. Vasan telephoned him upon receipt of the Notice of Hearing dated July 11th, 1986. The Tribunal's notes indicated that this was what Mr. Sodhi had advised the Tribunal in the course of setting out a chronology of what had occurred as part of his original submissions on the motion for adjournment.

Mr. Sodhi, however, took the position that the Tribunal's understanding of his submissions was in error and that he, in fact, had stated that he first became aware of the dates set for the hearing upon his receipt of Mr. Vasan's letter dated August 6th, 1986 (Exhibit 3-a).

The Tribunal has now had an opportunity to determine exactly what Mr. Sodhi said in his original submissions. In the course of setting out a chronology of events for the Tribunal, he stated as follows: "It was sometime around 16th, 17th or 18th of July that Mr. Vasan received the proposed dates. For some reason, Mr. Vasan does not immediately write to Mrs. Verge but calls me and informs me that on the 26th, he is not available and I tell him, please inform the Registrar. He said he would do so and then on August 6th, in less than three weeks, he sends out the letter to Mrs. Audrey Verge saying that he is going to be out of the country".

After the adjournment was refused, Mr. Sodhi withdrew from the hearing room and did not return. The hearing proceeded in his absence on August 26th and 27th, 1986.

The evidence put before the Tribunal on behalf of the Registrar of Real Estate and Business Brokers has established to the satisfaction of the Tribunal on both grounds set out in the Notice of Proposal that the registration of Mr. Sodhi as a real estate salesman should be revoked.

The first reason set out by the Registrar in his Notice of Proposal was:

(1) It is the Registrar's opinion that, having regard to his financial position, the registrant, Sodhi, cannot reasonably be expected to be financially responsible in the conduct of his business, within the meaning and contemplation of section 6(1)(a) of the Act and, by reason thereof, the registrant, Sodhi, is disentitled to continuation of registration as a real estate salesman under the Act.

With respect to this ground, evidence was put before the Tribunal in the form of Sheriff's Certificates showing that there are at least ten unpaid judgments outstanding against Mr. Sodhi in his personal capacity. These judgments date from 1971 to 1985.

It is the view of the Tribunal that the existence of so many unpaid judgments, many of which are for substantial amounts, alone suffices to establish that the Applicant cannot reasonably be expected to be financially responsible in the conduct of his business.

The Tribunal also has before it evidence that bankruptcy proceedings were instituted against Mr. Sodhi by one of the judgment creditors.

The second reason set out by the Registrar in his Notice of Proposal is as follows:

To further, or in the alternative, it is the Registrar's opinion that the past conduct of the registrant, Sodhi, affords reasonable grounds for belief that he will not carry on business in accordance with law and with integrity and honesty, within the meaning and contemplation of section 6(1)(b) of the Act and, by reason thereof, the registrant, Sodhi, is disentitled to continuation of registration as a real estate salesman under the Act.

With respect to this reason, there is evidence before the Tribunal that Mr. Sodhi was convicted of the following charges:

<u>Date and Place of Offence</u>	<u>Nature of Offence</u>	<u>Disposition</u>
October 3, 1972 Toronto	(1) Theft (2) False Pretences (2 charges).	(1-2) Suspended sentence and probation for six months.
April 24, 1973 Toronto	Fraud.	9 months.
July 27, 1982 Toronto	Using the mails to obtain money by false pretences.	Conditional discharge and probation for one year.
August 10, 1983 Toronto	Driving while exceeding 80 MG in blood.	Driving licence suspended.

No Certificates of Conviction were put before the Tribunal with respect to the four above-noted offences. It was the evidence of Mr. Coleclough, the Registrar of Real Estate and Business Brokers, that he was advised of the convictions by the Ontario Provincial Police. The Tribunal did have before it a copy of the Indictment relating to the charge of using the

mails to obtain money by false pretenses, which contained handwritten notes indicating that Mr. Sodhi had pleaded guilty to the charge and had received a conditional discharge and probation for a one year period (Exhibit 12). The Tribunal also has before it a copy of a computer printout setting out Mr. Sodhi's driver's licence record which shows that he was convicted of the charge of driving "while exceeding 80 MG in blood" on December 13th, 1984.

Although the rules of evidence before this Tribunal are somewhat more relaxed than they would be before a Court of law, and although the Tribunal is permitted to accept hearsay evidence in the course of a hearing, it is very regrettable that efforts were not made to put the best evidence possible before this Tribunal in order to establish that Mr. Sodhi was in fact convicted of the offences referred to in the Notice of Proposal. Nonetheless, the Tribunal is prepared to accept on prima facie basis that Mr. Sodhi was convicted of these offences. In the event that the Tribunal is in error in making this finding, it wishes to make it clear that it would have arrived at the same final decision with respect to this matter quite apart from this finding as to Mr. Sodhi's criminal convictions.

Nonetheless, the Tribunal is of the opinion that the existence of the criminal convictions referred to above afford reasonable grounds for the belief that Mr. Sodhi will not carry on business in accordance with law and with integrity and honesty.

There is clear evidence before the Tribunal that Mr. Sodhi gave false information to the Registrar as evidenced by the Application for Registration and Application for Renewal of Registration (Exhibits 9 and 9a).

Referring to the first application which is dated June 28th, 1983, Mr. Sodhi gave a negative response to the question, "Are there any unpaid judgments outstanding against you?" As is clear from the outstanding judgments referred to above, there were unpaid judgments outstanding against Mr. Sodhi as of June 22nd, 1983.

The Registrar also alleged in the Notice of Proposal that Mr. Sodhi failed or neglected to give full particulars of his criminal convictions. The Tribunal is not satisfied by the evidence put forward at the hearing that that allegation has been proved. The doubt in the mind of the Tribunal is raised by the fact that the handwritten words "schedule attached"

appear under the signature of Mr. Sodhi on the Application for Registration (Exhibit 9). While the Registrar's records do not include such a schedule, the possibility that such a schedule was attached to the application at the time that Mr. Sodhi filed it with the Registrar certainly exists. Accordingly, the Tribunal places no reliance on this allegation by the Registrar in arriving at its decision herein. It is also important to note that Mr. Sodhi did answer "yes" on the application in response to the question, "Have you ever been convicted under any law of any country, or state, or province thereof of an offence, or are there proceedings now pending? If yes, give full particulars of all such convictions and proceedings on separate sheet."

With respect to the application for Renewal of Registration dated the 24th day of August, 1985, Mr. Sodhi answered "No" to question 4b which reads: "Have you ever had a licence or registration of any kind refused, suspended, revoked or cancelled? If so give full particulars."

There is evidence before the Tribunal that at the time that Mr. Sodhi completed this application, his driver's licence had been suspended on two separate occasions in 1984. Accordingly, the answer provided by Mr. Sodhi is false.

With respect to question 5(a) on the application Mr. Sodhi answered "No" to the question: "Are you a discharged or undischarged bankrupt or presently a party to bankruptcy proceedings?" Mr. Sodhi was a party to bankruptcy proceedings at the time, namely, the proceedings referred to above commenced by the judgment creditor Art-U Graphics Ltd. Exhibit 4(a)-3 is an Affidavit of Service indicating that Mr. Sodhi was served with a petition for receiving order on June 13th, 1985, that is, prior to the date he completed the Renewal Application.

Mr. Sodhi also answered "No" to the question: "Are there any unpaid judgments outstanding against you?" Again this was clearly untrue.

In response to the question: "Have you ever been convicted under any law of any country, or state, or province hereof of an offence or are there any proceedings now pending? If yes give full particulars of all such convictions and proceedings on separate sheet", Mr. Sodhi has answered "No". Directly below that question, there is a printed note which reads:

Where the applicant has been previously registered, list only those convictions which have occurred since the date of last filing. You are not required to disclose any convictions for which a pardon has been granted under the Criminal Records Act and which pardon has not been revoked.*

Beside this note, there is an asterisk, and the asterisk is repeated below with a note in handwriting, presumably Mr. Sodhi's, stating, "The same as when applied". Even if the Tribunal assumes that a note was attached to the original application disclosing the first three convictions referred to in the Notice of Proposal, Mr. Sodhi was convicted of an additional offence between the time he completed the original application and the time he completed the application for Renewal of Registration. This is the conviction for "driving while exceeding 80 MG in blood" that is referred to above. In view of this conviction, Mr. Sodhi's answer to question seven is clearly false.

With respect to the question on the Renewal Application, "Will you be engaged or employed in any other business, occupation or profession?", Mr. Sodhi failed to disclose the fact that he was engaged and employed in the business of Searchers Paralegal Services. It was the evidence of Mrs. Elena De'Seta that her dealings with Mr. Sodhi commenced at the end of August 1985. He provided her with paralegal services for which he later invoiced her on the letterhead of Searchers Paralegal Services, 50 Power Street, Toronto, Ontario.

The Tribunal is of the view that the fact that Mr. Sodhi furnished false information on the two applications referred to is in of itself sufficient "to afford reasonable grounds for the belief that he will not carry on business in accordance with law and with integrity and honesty".

The Tribunal, as indicated above, heard the evidence of Mrs. Elena De'Seta who dealt with Mr. Sodhi in his capacity as a paralegal carrying on under the style of Searchers Paralegal Services. It was the evidence of Mrs. De'Seta that on September 9th, 1985 Mr. Sodhi agreed to incorporate a business for her and she paid him the sum of \$520.00. He promised her that he would proceed with and complete the incorporation within a matter of days. However, Mr. Sodhi failed to do the incorporation, despite numerous telephone calls by Mrs. De'Seta and by her husband Robert De'Seta. Finally Mrs. De'Seta retained another solicitor and on December 5th, 1985, she placed a complaint with the Consumers

Advisory Services branch of the Ministry of Consumer and Commercial Relations. Shortly thereafter she was able to reach Mr. Sodhi by telephone and at that time, he promised to return her money to her. To date he has not done so. Mrs. De'Seta testified that she has had no further direct contact with Mr. Sodhi, but that she has become aware that Mr. Sodhi has sent a number of letters to her former landlord, her bank, her former partner and the major supplier of her present business.

The Tribunal has before it two of these letters (Exhibits 16 and 14g). Mrs. De'Seta testified that in the letter of July 4th, 1986 written by Mr. Sodhi to her former landlord Mr. Rosano Savassi (Exhibit 14g), Mr. Sodhi disclosed confidential information.

In the view of the Tribunal, Mr. Sodhi's conduct in his dealings with Mrs. De'Seta afford reasonable grounds for the belief that he will not carry on business in accordance with law and with integrity and honesty. The Tribunal in particular relies on the fact that he failed to incorporate her business as he had promised Mrs. De'Seta, he failed to refund her money after he promised to do so, and he disclosed confidential information to her former landlord.

Counsel referred the Tribunal to the unreported Decision of the Divisional Court in Re: Brenner and the Registrar of Motor Vehicle Dealers and Salesmen. There the Divisional Court considered the effect of section 7(4) of the Motor Vehicle Dealers Act. That section is almost identical to section 9(4) of the Real Estate and Business Brokers Act. At page four of its Decision which was delivered on April 7th, 1983, Mr. Justice Southey states:

The effect of section 7(4) is that the Tribunal should only have refused to direct the Registrar to carry out his proposal if it thought the Registrar was in error in concluding that the past conduct of the applicant afforded reasonable grounds for the belief that he would not carry on business in accordance with law and with integrity and honesty.

Given the evidence before it, the Tribunal is of the opinion that the Registrar was not in error in his conclusion that Mr. Sodhi would not carry on business in accordance with law and with integrity and honesty. Furthermore, the Tribunal

is of the opinion that the Registrar was not in error in concluding that Mr. Sodhi could not reasonably be expected to be financially responsible in the conduct of his business.

Accordingly by virtue of the authority vested in it under Section 9(4) of the Real Estate and Business Brokers Act, the Tribunal directs the Registrar to carry out his Proposal and refuse registration. *

* Note: The above decision was appealed to the Supreme Court of Ontario (Divisional Court) by Tikka Datinder Singh Sodhi. The appeal had not been concluded at the time of this publication.

COSMOPOLITAN TRAVEL BUREAU LTD.

APPEAL FROM THE DECISION OF THE
BOARD OF TRUSTEES UNDER THE TRAVEL INDUSTRY ACT
TO DISALLOW A CLAIM

TRIBUNAL: STEPHANIE J. WYCHOWANEC, Q.C., CHAIRMAN, PRESIDING
HELEN J. MORNINGSTAR, MEMBER
KEITH COPPARD, MEMBER

APPEARANCES:
LAWRENCE S. GOLD, representing the Applicant
MICHAEL D. LIPTON, Q.C., representing the
Board of Trustees

DATE OF
HEARING: 10 June 1986 Toronto

REASONS FOR DECISION AND ORDER

Cosmopolitan Travel Bureau Ltd. appeals the decision of the Board of Trustees under the Travel Industry Act wherein the Trustees determined that Cosmopolitan's claim made pursuant to Section 15(3) of the Schedule to Regulation 938 R.R.O. 1980 was not eligible for payment.

The salient facts related to the claim briefly are as follows:

Cosmopolitan, a registered travel agent and travel wholesaler, is also a registered I.A.T.A. appointee for Pan American Airlines. As an appointee, it can issue Pan American tickets directly. Barton Travels Limited, a registered travel agent, purchases such airline tickets for its clients from Cosmopolitan. Cosmopolitan issued the tickets in the name of the client but was paid by cheque drawn on Barton's own account. As it turned out, five cheques issued by Barton between June 29, 1985, and July 19, 1985 were returned by the bank marked "insufficient funds". Some replacement cheques were issued by Barton, but they too proved to be non-negotiable. The tickets which Cosmopolitan issued were not in all cases used immediately, but Mr. Sharma, one of the owners of Cosmopolitan, did not attempt either to cancel any of the outstanding tickets after the financial difficulties with Barton first came to light or to demand payment in cash or certified cheque for new tickets to be issued.

These steps were not taken, partly because the firm wanted to maintain its account in good standing with Pan American Airlines, and partly because of the potential negative impact such action would have on the firm's reputation in the Indian community. However, initially no action was taken because Cosmopolitan fully expected to be paid in due course. Eventually all of the tickets issued by Cosmopolitan were delivered to and used by Barton's clients.

Although Cosmopolitan made several attempts to recover the money owing from Barton, it was unsuccessful. Subsequently, Cosmopolitan reported the situation to the Ministry and some time later Barton's registration as a travel agent was suspended.

Cosmopolitan's initial claim against the fund was for some \$21,897.00. During the hearing, the claim was reduced to \$8,655.00 which was the total amount represented by the cheques issued by Barton on June 29 and July 16, 1985. It appears that by the time the remaining three cheques were accepted by Cosmopolitan, it knew that the first two had been returned by the bank.

Mr. Gold, counsel for Cosmopolitan argued that the claim, as adjusted, was four square within the language of Section 15(3) of the Schedule and should, therefore, be allowed. He distinguished the cases previously cited to him by Mr. Lipton wherein claims had been disallowed by this Tribunal.

Mr. Lipton relied on these previous decisions in support of his argument that since the clients of Barton were never at risk, because they obtained the travel services almost immediately, the fund was not available to reimburse the travel wholesaler, particularly in circumstances where there was an apparent extension of credit to the travel agent.

The Tribunal has carefully reviewed the decisions cited and the legislation itself before reaching its conclusion.

Section 23 of the Regulations outlines the obligations or duties of a travel agent or travel wholesaler with respect to monies received for the purchase of travel services. Subsection 2 of this Section states that all funds received by a travel agent or a travel wholesaler for the purchase of travel services to be performed in the future are deemed trust funds. Subsection 5 requires all such trust funds, whether received by cash, cheque or otherwise, to be deposited in a trust account within two banking days of receipt. Subsection 7

provides that no travel agent or travel wholesaler shall disburse or withdraw any monies held in trust until payment is to be made to the person providing the travel service.

In an ideal world, if all the requirements as to trust funds are complied with, the client paying for travel services, may feel confident that his money will be properly used and will be recoverable in the event that something goes wrong. To further protect the client, a compensation fund was established.

In the context of the Regulations made under the Act, a "client" although not specifically so defined, is a person who purchases travel services from a travel agent for his own use or for the use of another at his expense and not for resale to another person.

The Schedule to the Regulations made under the Travel Industry Act, sets out the scheme of the compensation fund, how it is to be established, how it is to be administered and by whom, and how claims are to be paid out.

Mr. Gold asks the Tribunal to read Section 15(3) of the Schedule in isolation and to make its decision on that basis alone. The Tribunal does not accept that argument. In the Tribunal's opinion, the subsection should not be read in isolation but should be read in the context of the Act, the regulations and the Schedule and, in particular, in the context of Section 15 of the Schedule.

The preamble to Section 15(1) reads as follows:

The fund is established to stand in the place and stead of a participant for the payment out of the fund of such claims of clients of the participant that the participant has refused after demand or is unable to pay, provided that the claims meet the following requirements.

(emphasis added)

There then follow the conditions relating to the client which must be satisfied before payment out of the fund may be made, namely, that:

- the client must have made payment for travel services to a travel agent, and
- the travel services must not have been received.

The purpose of the fund is clear - to reimburse the client/consumer where through no fault of his own, he is denied travel services for which he has paid. The purpose of the fund was not extended or expanded by the inclusion of subsection 2 of the section or the addition of subsection 3 some time later.

Subsection 2 of Section 15 allows a travel agent to turn to the fund if a travel wholesaler fails to provide the travel services paid for by a client, if the travel agent chooses at his own expense, to make other arrangements on the client's behalf. The travel agent, by taking such action, steps into the shoes of the client, who could otherwise have claimed against the fund, and is therefore able, in turn, to claim on the fund. This is entirely in keeping with the stated purpose of the fund.

Subsection 3 of Section 15 was added some time later. The Tribunal was told by the Registrar, Mr. Caven, that it was enacted with the intention of putting the travel wholesaler on a similar footing as the travel agent in subsection 2 in situations where travel services were not available or provided to a client even though the client had paid a travel agent for them. The client, having paid the travel agent for travel services which were not receivable because the money had not passed to the wholesaler, would have a claim against the fund. If the travel wholesaler then either reimbursed the client or provided the travel service contracted for, the wholesaler could take the place of the client and claim.

In subsection 3, the words "has provided the travel service contracted for but not paid for by the travel agent", in isolation, could be interpreted to mean travel services provided at anytime. However, if these words are so interpreted, and it did not matter if the client ever had a crystallized claim against the fund, the nature of the fund would be substantially altered. It would be, as the Tribunal in other decisions described it, an insurance fund for the bad debts or business risks of the travel wholesaler. Had this been the intention, the purpose of the fund would have been amended to reflect this.

In the Tribunal's opinion, the quoted words, in the context of the whole of the Regulations, the Schedule and in particular Section 15, should be and can be interpreted in the sense that the travel wholesaler has provided the travel service after the client has been put in the position that the contracted travel service is not available to him because the travel agent has failed to pass the client's money to the travel wholesaler. In such a situation, the client has a claim against the fund. By then providing the travel service, the wholesaler steps into the shoes of the client and may claim in his place.

Unless this sequence of events prevails in the first instance, a travel wholesaler has no access to the fund, and it is immaterial whether he extended credit to the travel agent or was a victim of fraud, or whether he acted in good faith and at arm's length.

In the present case, there was never any suggestion that travel services would not be received by Barton's clients. Barton's clients were never in the position of having a claim against the fund. They received the travel services contracted for almost immediately and used them. Therefore, the claim of Cosmopolitan must fail because it did not provide the travel service in accordance with subsection 3 of Section 15 of the Schedule.

Therefore by virtue of the authority vested in it under Section 16(3) of the Schedule to revised Regulation 938 under the Travel Industry Act, the Tribunal disallows the claim of Cosmopolitan Travel Bureau Ltd.

ONKAR TRAVELS

APPEAL FROM A DECISION OF THE
BOARD OF TRUSTEES UNDER THE TRAVEL INDUSTRY ACT
TO DISALLOW A CLAIM

TRIBUNAL: MARY G. CRITELLI, VICE-CHAIRMAN, PRESIDING
HELEN J. MORNINGSTAR, MEMBER
GLORIA ANEVICH, MEMBER

APPEARANCES:

RATINDER PAL SIDHU
Agent, representing the Applicant
MICHAEL D. LIPTON, Q.C.,
representing the Board of Trustees

DATE OF

HEARING: 4 November 1986

Toronto

REASONS FOR DECISION AND ORDER

The hearing was requested by the claimant Onkar Travels pursuant to Section 16(1) of the Schedule to Regulation 938, R.R.O. 1980, under the Travel Industry Act, R.S.O. 1980, Chapter 509, for the review of a Decision made by the Board of Trustees appointed under that Schedule whereby the claimant was denied payment of its claim against the Compensation Fund in the amount of \$43,340.00.

The claimant is a travel agent and it is admitted that at all relevant times, it was a participant as defined in the Schedule. The travel agent claim form filed by the claimant with the Board of Trustees alleges that funds were paid over by the claimant to Skybridge Tours. Skybridge Tours is described in the same claim form as a travel wholesaler.

Under subsection 15(2) of the Schedule, where a claim is made against the Compensation Fund by a travel agent who has passed funds to a travel wholesaler, in order for the claim to succeed, it must first be established that both the travel agent and the travel wholesaler were participants at the time that the funds were passed. A participant is defined in the Schedule as any travel agent or travel wholesaler who is a subscriber to the Fund with the approval of the Registrar. While the claimant was clearly a participant, the evidence before us indicates that the wholesaler was not a participant.

Exhibit 9 comprises a number of certificates issued pursuant to Section 26 of the Travel Industry Act. These indicate that the following entities have either never been registered under that Act and have never been participants in the Compensation Fund or were not so registered and were not participants at the time that the claimant passed its funds to Skybridge Tours: Skybridge Travel, Skybridge Tours, Skybridge Tours Eastern Inc., Skybridge Travel Inc., Century Tours (Skybridge), and Century Tours Ltd.

The claimant has argued that it acted throughout in good faith without knowledge that Skybridge Tours was not a participant. This is not disputed by counsel for the Board of Trustees. While the Tribunal sympathizes with the claimant, its hands are tied in this matter. The Tribunal's authority extends only to claims which clearly fall within the terms of Section 15 of the Schedule. It has no authority or discretion to stretch the ambit of the coverage beyond the limits that the drafters of the Schedule clearly intended to apply.

Accordingly the Tribunal must hold that the claimant does not have a valid claim against the Fund. By virtue of the authority vested in it under Section 16(3) of the Schedule to Revised Regulation 938 under the Travel Industry Act, the Tribunal disallows the claim of Onkar Travels.

TOUR EAST HOLIDAYS (CANADA) INC.

APPEAL FROM A DECISION OF THE
BOARD OF TRUSTEES UNDER THE TRAVEL INDUSTRY ACT
TO DISALLOW A CLAIM

TRIBUNAL: STEPHANIE J. WYCHOWANEC, Q.C., CHAIRMAN, PRESIDING
DR. STUART E. ROSENBERG, MEMBER
JOHN H. AUSTIN, MEMBER

APPEARANCES:

WILLIAM WONG, representing the Applicant

MICHAEL D. LIPTON, Q.C., representing the
Board of Trustees

DATE OF
HEARING: 3 June 1986

Toronto

REASONS FOR DECISION AND ORDER

The Applicant, Tour East Holidays (Canada) Inc., a registered travel wholesaler and travel agent is appealing the decision of the Board of Trustees under the Travel Industry Act, wherein the Board denied the claim of Tour East. The claim was made under Section 15(3) of the Schedule contained in Regulation 938 under the Travel Industry Act, R.R.O. 1980.

The facts leading to the claim are as follows:

Tour East had been dealing with the owners of Manila International Travel, a registered travel agent, since 1983. As a travel agent, Manila could only sell to the public, travel services provided by another person. When Manila's clients needed air travel tickets, Manila would have to purchase the tickets from a travel wholesaler or a carrier. Manila could obtain travel services for its clients from any travel wholesaler who chose to do business with it. According to the evidence, Manila dealt with several travel wholesalers in addition to Tour East. Tour East accepted cash, cheques or credit card vouchers as payment for air travel tickets. In some cases, Tour East supplied the tickets directly from the carrier and in others obtained them from other travel wholesalers.

To facilitate the purchase of air travel tickets by credit card, Tour East provided Manila with blank universal credit card vouchers which Manila would complete in its offices as needed. This would include inserting the name of the credit card issuer, the credit card number and the name and signature of the credit card holder. If the passenger was not the holder of the credit card, his name would also be inserted in the space provided for that purpose.

When Manila needed tickets, Tour East would first be advised by telephone. Then Manila staff or the owners would come to the office of Tour East with the cash, cheques and/or completed credit card vouchers and pay for the airline tickets. If credit card vouchers were involved in the transaction, Tour East would telephone the credit card issuer and obtain an approval code number which would then be inserted on the credit card voucher by Tour East. Tour East would then hand over the tickets to Manila.

During May, 1984, Manila, following the same procedure obtained, through three separate transactions, a number of airline tickets. These tickets were "paid for" in part by credit card vouchers. As it turned out, the credit card vouchers were fraudulent. Manila, evidently using information it had on file, inserted the names of credit card holders and the credit card numbers without the knowledge of the credit card holders and forged the signature of those holders. In due course, the frauds were discovered and charges under the Criminal Code were laid against the principals of Manila. Using the same fraudulent scheme, Manila victimized several other travel wholesalers and a carrier.

Meanwhile, of course, the travel tickets having been issued by Tour East, were used by the ticket holders who had, it appears, paid Manila initially and who were at all times innocent parties to the scheme.

When Tour East, one of the victims of the fraud, discovered that payment for the travel tickets would not be forthcoming from the credit card issuers, it decided for whatever reason to pay the actual supplier of the tickets out of its own funds. To mitigate its loss, it obtained a promissory note from Manila for \$6,501.38 and, in fact, recovered \$3,000.00. For the balance owing, Tour East now seeks to recover from the Compensation Fund established under the Travel Industry Act.

As noted above, the claim is made under Section 15(3) of the Schedule which reads:

(3) Where a participant who is a travel wholesaler has acted in good faith and at arm's length with a participant who is a travel agent and the travel agent has failed to pass his client's money to the travel wholesaler and the travel wholesaler has, at his own expense, reimbursed the client or has provided the travel service contracted for but not paid for by the travel agent to the travel wholesaler, the travel wholesaler shall be entitled to claim for the refund of that portion of the client's moneys received by the travel agent that the travel agent failed to pass to the travel wholesaler, but in no event shall the travel wholesaler be entitled to claim any portion of such moneys that represent commissions.

Mr. Wong, counsel for Tour East, argued that his client had acted throughout in good faith and had never intended to and did not extend credit to Manila. He said his client had dealt with Manila at arm's length. There was, he said, an ultimate failure to pass funds through the travel agent (Manila) to the travel wholesaler (Tour East). There was no suggestion that travel services had not been provided to the clients since the tickets had been used. It was his submission that all the criteria set out in subsection 3 of section 15 had been satisfied and, therefore, his client was entitled to payment out of the Compensation Fund.

Mr. Lipton argued that compensation from the Fund was only available to a travel wholesaler if the wholesaler elected to put the consumer/client's interest before his own and either provided the travel services to the consumer or repaid the money to him. In other words, if a client had paid a travel agent for travel services and the travel services were subsequently put in jeopardy because of some action of the travel agent, the travel wholesaler who was the provider of the service could elect to provide the travel services paid for but not yet used even though he had received no money therefor or could give the money paid to the travel agent back to the client. Only in these circumstances, it was argued, could the travel wholesaler claim against the Fund.

In the present case, since the clients were never at risk (they got the tickets and used them), and since Tour East was unaware of the fraud prior to the travel services being used and, consequently, could not have made conscious election or decision to do anything related to the client, the Fund was not obliged to reimburse it for its loss.

In support of his submissions, Mr. Lipton referred the Tribunal to several of its earlier decisions which he believed would assist it in its deliberations.

In the first decision cited, Ontario Motor League World Wide Travel (London) Ltd., heard in 1979, the claim was under section 15(2) of the Schedule. Subsection (2) limits any claim for refund to that portion of the client's money passed by the travel agent to the travel wholesaler. In that case, the travel agent paid the travel wholesaler for travel services out of its own funds. The client could not take the trip for medical reasons and the travel agent advised the travel wholesaler accordingly and asked for a refund of its money. The travel wholesaler did not refund the money and some time later ceased to carry on business. When it was evident that no refund would be forthcoming, the travel agent applied to the Fund for compensation. The Tribunal held that because the travel agent had not passed his client's money to the travel wholesaler, that of itself constituted a bar to the claim. As an aside, the Tribunal added that the Travel Industry Act had been passed for the protection of the public and said that, "This decision will properly be interpreted that an agent dealing with a wholesaler must collect clients' funds prior to making payments to the wholesaler to protect his interests".

The next decision, Der Travel Service Limited, issued in July, 1981, dealt with a claim by a travel wholesaler under Section 15(3). In rejecting the claim, the Board of Trustees cited three reasons, namely, that at no time were the clients' monies received by the travel agent; that the claim was a trade debt not covered by the legislation; and no reasonable efforts were made by the travel wholesaler to collect the debt from the travel agent. The Tribunal made no clear finding on the issue of passage of clients' monies although it did appear to have some doubt that the travel tickets had been used. Without elaborating on the facts, the Tribunal found that the claims arose from what the Tribunal considered to be in essence trade debts. Having come to this conclusion, the Tribunal went to some pains to explain why such debts were not recoverable from the Fund.

These were that:

- business risks were not intended to be insured by the Fund;
- the Fund should not and cannot operate as a kind of business insurance to protect firms against ordinary business losses;
- the Fund was designated for the protection of the consuming public;
- credit extended must be at the risk of the travel wholesaler and not at the risk of the Fund.

The Tribunal then went on to say:

The Fund can operate to protect a travel wholesaling firm in a case where it has sustained a loss as the result of some act undertaken deliberately to protect a consumer or consumers who would otherwise have sustained a loss.

Mr. Lipton laid great stress on this statement.

The third decision, M & M Travel, issued January, 1982, dealt with a situation where a travel agent passed his client's money to a travel wholesaler who failed to provide the travel services required. The travel agent, M & M Travel, arranged for a substitute trip for which it paid out of its own funds, meanwhile cancelling the original trip and demanding a refund. Before a refund was made by the travel wholesaler, it ceased business. M & M Travel then claimed against the Compensation Fund. The Board of Trustees refused the claim on the grounds that the claim represented a business loss and that M & M had not diligently attempted to recover the money from the travel wholesaler. The Tribunal relied on the "rules" laid down in the Der case. It said that in its view, "the principles established in those cases are binding upon us, especially the rules we laid down in the case of Der Travel. This Fund is not business insurance. It exists to protect the public, not business concerns which may choose to extend credit at their own risk beyond the limits of reasonable prudence", and denied the claim on this basis. The Tribunal did not address itself to the specific wording of Section 15(2) of the Schedule.

The fourth decision cited by Mr. Lipton was that of Five Continents Travel Agency issued in May, 1983. That decision dealt with a claim by a travel wholesaler. In that case, a travel agent (M) obtained 69 travel tickets for another travel agent (B) from Five Continents, the wholesaler. Although the clients had paid their travel agent B and B had passed the monies, some \$114,000 to M, M failed to pass the monies to Five Continents. Although the failure to receive payment for the 69 tickets was discovered the following day, Five Continents believed it could not prevent the use of the tickets which had been delivered by that time by M to B and then to B's clients. The clients, therefore, received the travel services for which they had paid and Five Continents was 'out' \$114,000. In spite of this, Five Continents continued to do business with M and evidently took a mortgage on M's house for some \$60,000 as security for the \$114,000. The claim finally made against the Compensation Fund was for some \$60,000.

The Tribunal found that there had been a de facto extension of credit from Five Continents to M.

The Reasons for Decision of the Tribunal in that case read, in part, as follows:

Rule 15(2a) [now Section 15(3)] applies where a Travel Wholesaler elects to put the interests of a consumer before his own and suffers loss. There was no such noble election in this case. No such noble option was exercised because we do not think it was available or even perceived by the Wholesaler to be available to him...In particular, a bad precedent, if we were to set it in this case, would expose the fund to claims for trade losses making it a kind of business insurance instead of pure protection for members of the traveling public as consumers as it is meant to be. It would also lower the standards of good business practice in this industry by encouraging all manner of sloppy practices through the implied assurance that it would stand by to protect against losses arising from these.

After quoting, with approval, from the three decisions previously noted, the Tribunal denied the claim of Five Continents and upheld the decision of the Board of Trustees.

The final decision brought to the attention of the Tribunal was that of International Agency Travel Service issued in July, 1983.

The facts in this case are simple. A travel agent received some \$1,945.00 from a client to purchase an air travel ticket. The travel agent obtained the required tickets from the travel wholesaler but did not pass the client's funds to him. Nevertheless, the ticket was delivered to the travel agent and in turn, to the client, who made full use of it. The travel agent went into bankruptcy before the travel wholesaler could be paid. The travel wholesaler then filed a claim against the Compensation Fund, but the claim was rejected by the Board of Trustees. The wholesaler then appealed to this Tribunal. The Tribunal found on the evidence that the travel wholesaler had extended credit to the travel agent and said that the extension of credit "divorced" the person from the protection of the Fund. It said, further, that "the fund is not business insurance, it protects consumers and, in some cases registrants against some risks inherent in the receiving and giving of travel services".

The Tribunal then confirmed the decision of the Board of Trustees.

These decisions have been of assistance to the Tribunal in its deliberations in this case. However, the Tribunal believes it is necessary to look to the legislation itself in reaching its decision.

The purpose of the Compensation Fund is clearly and unequivocally set out in the preamble to Section 15(1) of the Schedule. It reads as follows:

The fund is established to stand in the place and stead of a participant for the payment out of the fund of such claims of clients of the participant that the participant has refused after demand or is unable to pay...

(emphasis added)

The Fund has been established only for the benefit of the client and for no other person.

Subsections (2) and (3) of Section 15, therefore, cannot be read in isolation but must be read in conjunction with the clearly stated purpose of the Fund. The only way a travel agent or a travel wholesaler can have access to the Fund is, if in essence, he stands in the shoes of the client who would otherwise have access to the Fund.

Although the decisions of the Tribunal previously noted have wandered off on different tangents and have not expressed this proposition explicitly, it can be inferred from them.

If in the first instance, the client never had a claim on the Fund because he fully received the travel service for which he had paid and used it, then no one else can claim in the client's stead even though the third party may be out of pocket as a result of the transaction.

In the instant case, the clients of Manila appear to have paid for travel services, and clearly received and used them. They never had a claim against the Fund, therefore, on this ground the Tribunal finds that the claim of Tour East must fail. Accordingly it is immaterial whether Tour East extended credit to Manila or was a victim of fraud or whether it acted in good faith and at arm's length or not.

By virtue of the authority vested in it under Section 16(3) of the Schedule to revised Regulation 938 under the Travel Industry Act, the Tribunal disallows the claim of Tour East Holidays (Canada) Inc.

UNITED TRAVELS

APPEAL FROM THE DECISION OF THE
BOARD OF TRUSTEES UNDER THE TRAVEL INDUSTRY ACT
TO DISALLOW A CLAIM

TRIBUNAL: STEPHANIE J. WYCHOWANEC, Q.C., CHAIRMAN, PRESIDING
HELEN J. MORNINGSTAR, MEMBER
MARGARET DONALD, MEMBER

APPEARANCES:

JOSEPH VARGHESE, its Agent

MICHAEL D. LIPTON, Q.C., representing the
Board of Trustees

DATE OF

HEARING: 26 June 1986

Toronto

REASONS FOR DECISION AND ORDER

United Travels appeals the decision of the Board of Trustees under the Travel Industry Act wherein the Board determined that United's claim made pursuant to Section 15(3) of the Schedule to Regulation 938, R.R.O. 1980, was not eligible for payment.

The facts related to the claim briefly are as follows:

United Travels is a registered travel wholesaler and participant in the Compensation Fund established under the Travel Industry Act. Barton Travels Limited was a travel agent and also a participant in the Fund. United had a business relationship with Barton because Barton periodically purchased travel services for its clients from United. Barton also purchased travel services from other travel wholesalers including Cosmopolitan Travel Bureau Limited.

In mid-July, 1985, Barton purchased a number of travel tickets for two clients, the Thomas family and the Simon family. The tickets were paid for in part by two postdated cheques, each in the amount of \$4,1085.16, drawn on Barton's bank account. The cheques were dated August 6, 1985 and August 9, 1985. Although the cheques were postdated,

Barton asked United to delay in presenting the cheques for payment. Meanwhile the issued tickets were used by Barton's clients, the first departure date being July 27, 1985.

As agreed, United did delay in presenting the cheques for payment, but finally in November the cheques were deposited by United. They were returned by Barton's bank marked "N.S.F." and "payment stopped".

In another transaction on December 13, 1985, likely after the cheques from the July transaction had been returned, Barton purchased a travel ticket for another client from United. The ticket was again paid for by a cheque drawn on Barton's account. The cheque was dated December 13, 1985, but evidently not deposited until December 24. It too was returned marked "N.S.F." The departure date on the ticket was December 22, 1985, and it appears that the client received and used the ticket on that date.

United, having failed to recover its money from Barton, sought to be reimbursed for all of the abovenoted tickets from the Compensation Fund under the provision of Section 15(3) of the Schedule to the Regulation. The total amount claimed was \$10,893.76. The claim was denied by the Board of Trustees on the basis that "this claim is a 'trade debt' and does not come under the regulations for claim against the Fund." It is this decision which is now under appeal to this Tribunal.

Mr. Lipton, counsel for the Board of Trustees, cited in argument five of this Tribunal's earlier decisions in support of his submission that the claim should be disallowed. Mr. Varghese, the vice-president of United, argued that he never intended to extend credit to Barton, that the amounts owing were not trade debts, that trade debts are not even mentioned in Section 15(3) of the Schedule and that United, meeting all of the conditions contained in the subsection, was entitled to be reimbursed.

In recent weeks this Tribunal has dealt with two separate claims by travel wholesalers who supplied tickets to a travel agent but have not received payment for them.

In its decision in *Tour East Holidays (Canada) Inc.*, released on June 27, 1986, the Tribunal reviewed, in some detail, the five decisions cited by Mr. Lipton and does not propose to do so again.

In the Cosmopolitan Travel Bureau Ltd decision released July 11, 1986, a case on all fours with the present appeal, the Tribunal went to some length to review the legislation governing the establishment of and access to the Compensation Fund. The Tribunal's conclusion was as follows:

In subsection 3, the words "has provided the travel service contracted for but not paid for by the travel agent," in isolation, could be interpreted to mean travel services provided at any time. However, if these words are so interpreted, and it did not matter if the client ever had a crystallized claim against the fund, the nature of the fund would be substantially altered. It would be, as the Tribunal in other decisions described it, an insurance fund for the bad debts or business risks of the travel wholesaler. Had this been the intention, the purpose of the fund would have been amended to reflect this.

In the Tribunal's opinion, the quoted words, in the context of the whole of the Regulations, the Schedule and in particular Section 15, should be and can be interpreted in the sense that the travel wholesaler has provided the travel service after the client has been put in the position that the contracted travel service is not available to him because the travel agent has failed to pass the client's money to the travel wholesaler. In such a situation, the client has a claim against the fund. By then providing the travel service, the wholesaler steps into the shoes of the client and may claim in his place.

Unless this sequence of events prevails in the first instance, a travel wholesaler has no access to the fund, and it is immaterial whether he extended credit to the travel agent or was a victim of fraud, or whether he acted in good faith and at arm's length.

The Tribunal does not accept Mr. Varghese's submission that he did not intend to extend credit to Barton. The facts speak for themselves. However, as the Tribunal has pointed out, this is immaterial if the client or clients received the travel services without ever being in the position of having the travel services refused or in some way put in jeopardy. Here the clients of Barton were never at risk. They obtained and used the air travel tickets shortly after they were obtained by Barton and before Barton's cheques were deposited by United. United Travels, in these circumstances can have no access to the Fund.

Therefore, by virtue of the authority vested in it under Section 16(3) of the Schedule to Revised Regulation 938 under the Travel Industry Act, the Tribunal disallows the claim of United Travels.

ANGELA STIPPINGER
(AGS INTERNATIONAL TRAVEL & SERVICES)

HEARING TO CONSIDER AN APPLICATION
FOR A STAY BY THE APPLICANT OF THE
ORDER OF THE REGISTRAR UNDER THE TRAVEL INDUSTRY ACT
FOR IMMEDIATE TEMPORARY SUSPENSION

TRIBUNAL: STEPHANIE J. WYCHOWANEC, Q.C., CHAIRMAN, PRESIDING
DR. STUART E. ROSENBERG, MEMBER
JOHN AUSTIN, MEMBER

APPEARANCES:

GERD STIPPINGER, Agent, representing the Applicant

A.N. MAJAINA, representing the the Registrar
under the Travel Industry Act

DATE OF
HEARING: 4 June 1986

Toronto

REASONS FOR RULING

The Applicant, AGS International Travel & Services, has filed an appeal from the Proposal of the Registrar under the Travel Industry Act to revoke its registration and has asked the Tribunal to stay the order of immediate Temporary Suspension.

At the outset of the hearing, the Tribunal made it clear that it would not deal with the merits of the appeal on the Proposal, but only with the issue of whether a stay of the Registrar's suspension Order should be granted pending a full hearing of the matter.

Mr. Majaina, counsel for the Registrar, has asked that the Order be extended under section 7 of the Travel Industry Act. Without repeating what was in the Registrar's Proposal, he noted the many instances where the Applicant has failed to comply with the Act and the Regulations. He also noted the numerous times that the Applicant has promised to comply with the Act and has failed to do so. Mr. Stippinger, appearing for AGS, has not denied that there has been non-compliance. He advised the Tribunal that the primary effort was to establish the business, and that the requirements of the Act were neglected. He stated that this was a deplorable situation and the Tribunal agrees with this assessment.

In a decision in 1984, this Tribunal determined the guidelines for dealing with applications for a stay of an Order. These guidelines are:

- 1) that the appeal be bona fide;
- 2) that the grounds of appeal are substantial; and
- 3) that the balance of interest is in favour of the Applicants.

Mr. Stippinger has said that if the Order is extended then ACS would be out of business. On the other hand, the Tribunal must weigh the possible risk to the public. Given the past conduct of the Applicant and the repeated failure to meet its undertakings, the Tribunal believes that the public would not be well served if the Order was allowed to expire. Any person desiring to enter into the travel agency business must do so on the understanding that it is a regulated industry, and that all facets of the Act and its Regulations must be complied with if that business is to be allowed to continue to operate.

Therefore, this Tribunal adjourns the hearing sine die to be brought back on 10 days' notice to both sides to a date to be fixed by the Registrar, and it Orders by virtue of the authority vested in it under section 7 of the Travel Industry Act that the time of expiration of the said Order of Interim Suspension be and the same is extended until the hearing is concluded.

CENTENNIAL PLYMOUTH CHRYSLER (1973) LTD.
D. BROWN MOTORS (BARRIE) LIMITED
GORDON D. COATES

HEARING TO CONSIDER AN APPLICATION FOR A STAY UNTIL
DISPOSITION OF THE APPEAL OF A DECISION AND ORDER OF
THE COMMERCIAL REGISTRATION APPEAL TRIBUNAL
DIRECTING THE REGISTRAR TO CARRY OUT HIS PROPOSAL TO
REVOKE THE RESPECTIVE REGISTRATIONS OF THE
APPLICANTS FORTHWITH UPON THE ISSUANCE OF THE
REASONS FOR DECISION.

TRIBUNAL: STEPHANIE J. WYCHOWANEC, Q.C., CHAIRMAN, PRESIDING
DR. STUART E. ROSENBERG, MEMBER
KEITH COULTER, MEMBER

APPEARANCES:
ROBERT J. CARTER, Q.C., representing the Applicants
STEPHEN P. MARTIN, representing the Registrar
of Motor Vehicle Dealers and Salesmen

DATE OF
HEARING: 18 June 1986 Toronto

REASONS FOR RULING

On June 12th, 1986, this Tribunal by its Decision and Order confirmed a Proposal of the Registrar of Motor Vehicle Dealers and Salesmen to revoke the registrations of Centennial Plymouth Chrysler (1973) Ltd., D. Brown Motors (Barrie) Limited and Gordon D. Coates. The decision of the Tribunal is now under appeal to the Divisional Court. Under Section 7(9) of the Motor Vehicle Dealers Act, an Order of the Tribunal takes immediate effect notwithstanding that the decision is under appeal unless the Tribunal itself grants a Stay of its Order.

The Tribunal has now had the opportunity to consider the submissions of counsel for the registrants and for the Registrar, and to review the decisions of the Court of Appeal and Divisional Court cited. In its own decisions, the Tribunal has been guided essentially by the factors set out in the Great Northern Capital Corporation decision. Therefore, in determining whether a stay should or should not be granted, the Tribunal takes the following matters into consideration:

- (1) Is the appeal to the Divisional Court bona fide?

There is no doubt in the Tribunal's mind that it is.

- (2) Are the grounds for appeal substantial?

The Notice of Appeal lists some five specific grounds. The merits of the appeal will, of course, be determined by the higher Court. This Tribunal is satisfied, however, that on the face of it, the grounds of appeal appear to have substance.

- (3) Finally, what is the hardship to the respective parties - the public on the one hand and the registrants on the other?

In the past, the Tribunal has held that unless the public was clearly at risk, that the benefit of an appeal procedure granted by the legislation should not, for all intents and purposes, be negated or frustrated by refusing to grant the stay. This approach is supported by the decision of Mr. Justice Callaghan in Van Brugge v. Arthur Frommer International Ltd. et al, 35 O.R. (2d), p.333 wherein he stated that, "The right to a stay is clear where refusal of stay would render the appeal nugatory".

In this case, the Tribunal must assume that the convictions registered against the Corporation and its own decision will act as a deterrent to further fraudulent activity on the part of the registrants.

Taking all these matters into account, the Tribunal concludes that a stay of its Order is appropriate. Therefore, by virtue of the authority vested in it under Section 7(9) of the Motor Vehicle Dealers Act, the Tribunal does grant a Stay of the its Order until disposition of the Appeal to the Divisional Court.

JOHNATHAN'S PLACE LIMITED
(JOHNATHAN'S PLACE RESTAURANT)
-and-
612471 ONTARIO LIMITED
(FIRENZE RISTORANTE ITALIANO)

HEARING TO CONSIDER APPLICATIONS
FOR A STAY BY THE LICENSEES OF THE DECISIONS OF THE
LIQUOR LICENCE BOARD FOR IMMEDIATE SUSPENSIONS

TRIBUNAL: STEPHANIE J. WYCHOWANEC, Q.C., CHAIRMAN, PRESIDING
KENNETH VAN HAMME, MEMBER
DENNIS J. EGAN, MEMBER

APPEARANCES:

JOSEPH MAGGISANO and BRIAN M. LECK,
representing the Applicants

S.A. GRANNUM, representing the Liquor Licence Board

DATE OF

HEARING: 30 May 1986

Toronto

REASONS FOR RULING

The Tribunal has now had the opportunity of reviewing the submissions of counsel for the Applicants and for the Board, as well as the three Decisions of this Tribunal wherein the issue of stay of an order were discussed. The Tribunal made it clear at the beginning of today's hearing that it would not deal with the merits of the two appeals filed, but would limit its deliberations to the issue of whether a stay of the Liquor Licence Board's Order should be granted under section 12(6) of the Liquor Licence Act.

Mr. Maggisano, counsel for the two Applicants, therefore, very briefly outlined the underlying reasons for the immediate suspension and revocation of the dining lounge licences for Johnathan's Place Restaurant and the Firenze Restaurant.

As the Tribunal understands the circumstances, the Liquor Licence Board took the action it did essentially on the basis that misrepresentation and/or false information had been found in the liquor licence applications relating to both businesses and, therefore, the businesses had not been

carried on in accordance with law and with honesty and integrity. These are very serious allegations in the eyes of the Tribunal and the Tribunal will examine all of the evidence related to these issues in detail when the merits of the appeals are heard.

Mr. Grannum informed the Tribunal that, as far as was known, the businesses were operating in accordance with the Liquor Licence Act and that there were no other breaches of the Act other than those of misrepresentation and/or false information. There are no known health or safety hazards related to the operation of the two businesses and the public does not appear to be at risk in this regard.

Mr. Maggisano outlined the consequences of immediate suspension and revocation of the dining lounge licences, namely, the loss of employment of some 30 or 35 employees, and the financial losses which might be incurred by the creditors of the two businesses and Mr. Yakhni personally. Mr. Grannum replied to this by stating that the businesses were not being closed completely, but given the current liquor/food ratios, there is no question that the immediate revocation of the liquor licences would seriously affect these operations.

Nothing was said today which would lead the Tribunal to conclude that the appeal was not bona fide. While the Notice of Appeal did not disclose grounds of appeal, the Tribunal takes from the comments of Mr. Maggisano, that in part, mitigating circumstances will be pleaded. From the submissions made and if past conduct is considered, it does not appear that the public will be prejudiced by not immediately revoking the dining lounge licences.

In weighing these factors, the Tribunal concludes that a stay should be granted until the Tribunal makes its decision. To do otherwise might do irreparable harm to the operation of the two businesses, such that the benefit of the appeal procedure granted by the legislation, would for all intents and purposes be negated.

Accordingly the Tribunal by virtue of its authority under section 12(6) of the Liquor Licence Act will grant the stay until the Tribunal makes its decision.

FRANK LEUNG

APPEAL FROM A PROPOSAL OF
THE REGISTRAR OF REAL ESTATE AND BUSINESS BROKERS
TO REVOKE THE REGISTRATION

TRIBUNAL: STEPHANIE J. WYCHOWANEC, Q.C., CHAIRMAN, PRESIDING
BARBARA NICHOLS, MEMBER
JOHN W. PATERSON, MEMBER

APPEARANCES:

HUGH ROWAN, Q.C., representing the Applicant

STEPHEN A. AUSTIN, representing the Registrar under
the Real Estate and Business Brokers Act

DATES OF

HEARING: 14, 15 May 1986

Toronto

REASONS FOR RULING

Counsel for the Registrar, Mr. Austin, called a witness, one Janina Kaminski. In his examination-in-chief, he attempted to establish the date upon which the listing for sale of property jointly owned by Mrs. Kaminski and her husband occurred and the circumstances surrounding it. In response to a number of questions, Mrs. Kaminski either said that she did not know or could not remember the particular details or circumstances about which she was being questioned. It was her evidence that she "guessed" the listing was initiated by her husband. She also said that when her husband had signed a document, she generally followed his lead as co-signer without reading it.

Counsel for the Registrar then referred the witness to a telephone conversation she had with an official of the Ministry of Consumer and Commercial Relations and asked several questions in relation to the identity of the official. While the witness recalled having the conversation, she could not identify the caller because she said she had not caught his name. This line of questioning was objected to by counsel for the Applicant.

The last two questions put to the witness were:

Q. Did a conversation take place between you and this gentleman regarding 507 Kingston Road?

A. I think it was, yes.

Q. You think it was?

Following this exchange, Mr. Austin asked that the witness be excluded from the hearing room and upon her withdrawal, he informed the Tribunal that it was his understanding that Mrs. Kaminski had had an extensive conversation with the Ministry official and that her memory was more explicit at that time. He then asked to have the witness declared hostile or adverse since it was his opinion that his witness was no longer reliable.

After some delay to permit both counsel to brief themselves on the issue, the Tribunal heard argument on this motion and reserved its decision.

Section 23 of the Evidence Act reads as follows:

23. A party producing a witness shall not be allowed to impeach his credit by general evidence of bad character, but he may contradict him by other evidence, or, if the witness in the opinion of the judge or other person presiding proves adverse, such party, may, by leave of the judge or other person presiding, prove that the witness made at some other time a statement inconsistent with his present testimony, but before such last-mentioned proof is given the circumstances of the proposed statement sufficient to designate the particular occasion shall be mentioned to the witness and he shall be asked whether or not he did make such statement.

This section was considered in two leading cases - Wawanesa Mutual Insurance Co. v. Hanes, 1961, O.R. 495 and Boland v. The Globe and Mail, 1961, 29 D.L.R. (2d) 401.

The Tribunal has now had the opportunity of reviewing these decisions of the Ontario Court of Appeal. The Wawanesa decision was considered in the Boland case.

In the Boland case, Schroeder, J.A. reviewed this history of the now section 23 of the Act. At page 421 and following he states:

Over the years there has been a divergence of judicial opinion as to the precise meaning to be attached to the word "adverse" as used in the section of the Common Law Procedure Act, 1854, which is the English equivalent of s. 20 [now section 23] of the Ontario Evidence Act. Prior to that enactment a witness might be cross-examined by counsel for the party who called him if the trial Judge was of the opinion that the witness was hostile in the sense that he showed a mind hostile to the party calling him and by his manner of giving evidence betrayed a desire not to tell the truth, and he declared that in his opinion the witness was hostile. So far as the conduct or demeanour of the witness on the stand served to afford proof of such an animus, the common law required no statutory alteration to provide relief to a disappointed or discomfited litigant. Once the witness was ruled to be hostile, the party calling him could cross-examine him upon all relevant facts, including a statement made by him at some other time inconsistent with the testimony then given by him. The enactment covers in part rules of evidence theretofore recognized at common law and as to which there was no controversy. Its primary purpose was to remove any doubt as to the right of a litigant to prove under the conditions prescribed by the section, that the apostate witness called by him had made at some other time a statement inconsistent with his testimony at the trial. The prerequisite laid down by the Act is that the Judge must grant the

party leave to prove that fact which he might grant if, in his opinion, the witness "proved adverse". What, then, would constitute proof of the witness' adverseness? There is a substantial body of judicial opinion to support the view that "adverse" as used in the statute was intended to convey the same idea as the word "hostile" was understood to signify at common law. The fact that the legislators used a different word in the enactment in question is not, however, without deep significance. Etymologically the word "adverse" expresses the concept of a "turning against" or of "setting oneself against" another, and in that sense it denotes an oppositional attitude. A witness who gives testimony at variance with a statement made by him at some other time is not necessarily hostile to the party who called him. It is obvious that both accounts cannot be true and when a witness' own prior contrary statement is examined it may tend to prove a defect of intelligence or memory, partisan bias, weak faculties of observation, or want of moral honesty or regard for truth. The method of impeaching a witness' credit by establishing prior self-contradiction at least demonstrates that the witness is capable of error and tends to weaken his testimony to that extent. The evidence of that witness could be very detrimental to the side on which he appeared and the purpose of the statute was to afford relief to a party whose cause was hurt by a witness who might not have been hostile but whose evidence was nevertheless adverse to the cause of the party who called him. The legislators manifestly scught after and used a term to depict a disposition of mind of the defaulting witness, which would have less extreme connotations than the word "hostile". But whether "adverse" portrays a mental attitude as moderate as that implied by the word "unfavourable" at the lower end

of the scale or as inordinate as that indicated by the word "hostile" at the upper level or whether it denotes a condition of mind midway between these two extremes, the crucial question is whether the trial Judge, when addressing himself to the task of deciding the point at issue should consider as evidence relevant and material to the subject of inquiry implicit in the terms of the statute, the alleged inconsistent statement attributed to the witness.

It is utterly improbable that the witness' testimony would have been offered if it had been anticipated that his evidence would have taken an untoward turn, and adverseness in a witness generally presents itself to the party who called him as a highly astonishing and unexpected development. The fact that the witness who is alleged to have proven adverse made at some other time a statement at variance with his testimony then under consideration is in the highest degree material to the subsidiary issue thus raised and, indeed, I cannot think of any single fact or piece of evidence that would be more competent as an aid in its determination. Whether it should be held that a witness has or has not proven adverse must depend upon the circumstances of each particular case.

The learned Judge's failure to receive and consider this evidence before deciding whether to grant or withhold the leave sought by the plaintiff was error in relation to a matter of substance which is sufficient in itself to justify an appellate Court in reviewing the exercise of the trial Judge's discretion.

It is sufficient to say that the learned Judge ought to have heard and to have given due consideration to the alleged inconsistent testimony of Hladun before ruling upon the plaintiff's application

under s. 20. I find support for that proposition in the recent judgment of this Court, differently constituted, in *Wawanesa Mutual Ins. Co. v. Hanes*, 28 D.L.R. (2d) 386, [1961] O.R. 495.

From all the evidence heard from Mrs. Kaminski so far, the Tribunal cannot conclude that she is adverse to the Registrar. However, if the Tribunal's interpretation of the Boland decision is correct, Mr. Austin must be given the opportunity to present evidence of an alleged inconsistency in her testimony and the Tribunal must consider that evidence before ruling on his motion. The Tribunal therefore directs that Mrs. Kaminski be recalled so that such questions as are necessary may be put to her in this regard. The Tribunal will then rule on the motion.

FRANK LEUNG

APPEAL FROM A PROPOSAL OF
THE REGISTRAR OF REAL ESTATE AND BUSINESS BROKERS
TO REVOKE THE REGISTRATION

TRIBUNAL: STEPHANIE J. WYCHOWANEC, Q.C., CHAIRMAN, PRESIDING
BARBARA NICHOLS, MEMBER
JOHN W. PATERSON, MEMBER

APPEARANCES:

HUGH ROWAN, Q.C., representing the Applicant

STEPHEN A. AUSTIN, representing the Registrar under
the Real Estate and Business Brokers Act

DATES OF

HEARING: 5, 6 June 1986

Toronto

REASONS FOR RULING

In the Reasons for Ruling released June 2, 1986, this Tribunal directed that Janina Kaminski, a witness called by counsel for the Registrar, be recalled for the purpose of examining her with reference to previous statements she had made to an official of the Ministry of Consumer and Commercial Relations. The examination was required in order to determine whether in fact statements inconsistent with those made before this Tribunal had been made to the official, and, if so, if there was an explanation for the discrepancies. After hearing this evidence, the Tribunal would be in a position to rule on Mr. Austin's motion to declare this witness adverse in interest.

Mrs. Kaminski did attend and the prior statements were put to her. The statements were put in evidence through Mr. MacKinnon, the Ministry official.

According to Mr. MacKinnon's evidence, the first conversation with Mrs. Kaminski began as follows:

our division does get involve (sic) in
matters (sic) to the Real Estate Business
Brokers Act and I'm working on such a
matter right now. I'm looking at a
multiple listing service agreement

dated July 2, 1985, it appears signed by Walter Kaminski and yourself and Steven Wong and someone else, I cannot make out the signature, who would that be?

The balance of the questions, in this very short conversation, essentially related to the identification of Frank Leung and Steve Wong; parties who were present when the agreement was signed; and whether Mr. Kaminski was at home at that time. The second conversation was an elaboration of the first, establishing when the agreement was signed and confirming the parties who were present. There was also a follow-up question on how long the Kaminski's had known Frank Leung or had used his services.

Although Mrs. Kaminski confirmed that she had spoken with someone from the Ministry, when questioned by Mr. Austin about her answers to Mr. MacKinnon, Mrs. Kaminski said she had been busy that day and that she could not recollect the exact statements she had made, and in some specific instances, particularly in relation to names, she denied what she is alleged to have said to Mr. MacKinnon. However, she finally agreed that the statements read to her from her conversation with Mr. MacKinnon were substantially correct in terms of what she actually said.

In considering the motion, the Tribunal has been guided by the decisions in Wawanesa Mutual Insurance Co. v. Hanes [1961] O.R. 495 and Boland v. The Globe and Mail Ltd., 1961 29 D.L.R. (2d) 401.

In the Wawanesa case, Porter C.J.O. at page 505 stated:

The word "adverse" is a more comprehensive expression than 'hostile.' It includes the concept of hostility of mind, but also includes what may be merely opposed in interest or unfavourable in the sense of opposite in position.

and at page 507, he said:

...the Judge should, to determine whether a witness is adverse, consider the testimony of the witness, and the statement, and satisfy himself upon any

relevant material presented to him that the witness made the statement. He should consider the relative importance of the statement, and whether it is substantially inconsistent. I think the Judge is entitled to consider all the surrounding circumstances that may assist him in forming his opinion as to whether the witness is adverse.

The Tribunal notes two matters. The first is that English is a second language for Mrs. Kaminski and while she is quite capable of understanding and responding to questions put to her in simple, everyday English, she seemed to have some difficulty in understanding and responding to questions which were long and/or used more technical terminology. The second matter to be noted is that the two conversations which she had with Mr. MacKinnon took place over the telephone. The first conversation was recorded by Mr. MacKinnon in longhand both during and after the conversation. These notes therefore were not a verbatim transcript of the whole conversation, but an edited version. The second conversation was taped and subsequently transcribed.

The difficulty the Tribunal has with these previous statements given to Mr. MacKinnon is that the Tribunal is not at all satisfied that Mrs. Kaminski knew exactly what agreement was being referred to by Mr. MacKinnon. Mrs. Kaminski, in an earlier appearance, has told the Tribunal that "if my husband sign something if it's on two names then I don't read it you know, whatever it says. I just sign." She did not have the July 2nd agreement with her when she was speaking with Mr. MacKinnon. Furthermore, there were in fact two multiple listing agreements purportedly signed by Mrs. Kaminski and her husband, one dated July 2, 1985, the other July 11, 1985.

In response to one of Mr. MacKinnon's questions in the second conversation, Mrs. Kaminski said in part:

We had a few deals so I don't remember if it was this one. If it was about the time we argued, but I think it was, because I think about the price or something else. I think it was night anyway.

On cross-examination by Mr. Rowan, Mrs. Kaminski stated that she thought Mr. MacKinnon was referring to the offer to purchase of 507 Kingston Road. Mrs. Kaminski was not sure what a 'multiple listing agreement' was.

The Tribunal has carefully compared the sworn testimony given by Mrs. Kaminski before this Tribunal and the statements she made to Mr. MacKinnon. There are some inconsistencies between the two, but given the circumstances of Mrs. Kaminski's conversations with Mr. MacKinnon, the Tribunal places little reliance or importance on her answers to him.

The demeanor of Mrs. Kaminski while before this Tribunal and her answers to both Counsel during examination-in-chief and cross-examination did not convey an impression of hostility of mind or opposition of interest or position to the Registrar. She appeared to be uncomfortable with the whole procedure and at times confused in her recollection of events that took place a year ago, but in the opinion of the Tribunal, she was not adverse in interest to the Registrar.

The motion brought by Mr. Austin to declare her adverse is therefore denied.

FLORENCE LOWES

APPEAL FROM THE DECISION OF THE
BOARD OF TRUSTEES UNDER THE TRAVEL INDUSTRY ACT
TO DISALLOW A CLAIM

TRIBUNAL: STEPHANIE J. WYCHOWANEC, Q.C., CHAIRMAN, PRESIDING
WATSON W. EVANS, MEMBER
JOHN AUSTIN, MEMBER

APPEARANCES:
ONELIA DELGADO, representing the Applicant
MICHAEL D. LIPTON, Q.C., representing the
Board of Trustees

DATE OF
HEARING: 26 May 1986 Toronto

REASONS FOR RULING

This application, brought by Florence Lowes, arises out of a series of events which began in early 1981. At that time Mrs. Lowes booked on a trip to China, Hong Kong, Japan and Taiwan with Lawson McKay Tours Limited. She paid \$1,235.00 as part payment for the trip. On or about April 8, 1981, Lawson McKay was placed into receivership and shortly thereafter Mrs. Lowes was advised that the trip would not proceed. At all material times Lawson McKay was registered under the Travel Industry Act as a "travel wholesaler" and was a participant in the Compensation Fund established under that Act and Regulations thereto.

Although Mrs. Lowes filed a chart containing the material details of her claim in September 1981, she did not file the formal Claim Form required by the legislation. Thus when this Tribunal heard some fifty claims arising out of the Lawson McKay receivership, it ruled that it had no jurisdiction to hear her claim because no claim had been made to the Board of Trustees.

In March 1982, the Tribunal released its decision respecting the fifty or so claims and ordered payment out of the Compensation Fund to those claimants only.

On December 15, 1982, O. Reg 815/82 was filed thereby revoking and amending in part Regulation 938 to the Travel Industry Act. The pertinent amendments provided that a claim against the Compensation Fund must be made within six months of

the refusal or failure to pay by a participant, that the Board of Trustees may grant an extension of time for making a claim against the Fund and that the decision of the Board of Trustees as to any such extension "shall be final and not subject to review". The six month period, commenced December 15, 1982, expired June 15, 1983.

Meanwhile, the decision of this Tribunal on the Lawson McKay claims was appealed to the Divisional Court by the Board of Trustees. The decision of that Court dismissed the appeal on June 21, 1983.

On or about August 29, 1983, the Board of Trustees received a Consumer Claim Form on behalf of Mrs. Lowes. The claim was considered ineligible for payment from the Compensation Fund by the Board of Trustees because the deadline for filing the claim had expired. The deadline date given by the Board of Trustees was June 15, 1983. Mrs. Lowes was so advised by letter dated December 19, 1983. Implicit in the denial of the claim was the refusal by the Board of Trustees to extend further the time for filing.

By registered letter dated December 21, 1983, Mrs. Lowes requested a hearing before this Tribunal. A hearing was held on June 25, 1985 during which essentially procedural matters were discussed and on consent the matter was adjourned sine die on a date to be fixed by the Registrar of this Tribunal.

The matter came before the Tribunal on May 26, 1986. The Tribunal heard argument as to its jurisdiction to hear the applicant's claim, reserved its decision on this issue, agreed to take judicial notice of its March 1982 decision on the Lawson McKay claims and heard the testimony of Mrs. Lowes with reference to the amounts claimed by her from the Compensation Fund.

On behalf of Mrs. Lowes, it is submitted firstly that in compliance with Section 15(5) of the Schedule to the Regulation under the Travel Industry Act, there was an effective claim filed during the early autumn of 1981. The Tribunal rejects this submission. This matter was previously dealt with by it in March 1982 when the Tribunal released its ruling that "no claim having been made to the Board of Trustees....it [the Tribunal] has no jurisdiction pursuant to Schedule Section 16(3)."

Secondly, it is submitted that the Lowes' claim should be determined in light of the legislation as it existed at the time Mrs. Lowes' claim against the Compensation Fund arose

(i.e. in April, 1981), and not on the basis of the later changes to the Regulations, because these amendments were not specifically stated to be retroactive.

Counsel for the Board of Trustees disagrees with this submission. He argued that the amendments to Regulation 938 as enacted by O. Reg. 815/82 related to procedures only and did not take away any rights of the claimant, therefore the presumption against retrospective or retroactive construction had no application. It was submitted further that in fact the amendments were not applied retroactively because the Board of Trustees deemed that the limitation period would commence to run from the date of enactment of the amendments.

The Tribunal has carefully considered the arguments of both counsel and the authorities cited.

As the Tribunal interprets the amendments contained in O. Reg. 815/82, if a right to claim against the Fund arose more than six months before the amendments became effective, and if such right had not been exercised prior to the enactment, the effect of the amendments was to bar such claim absolutely unless the Board of Trustees extended the time for filing. In the present case, the Board of Trustees apparently extended the time for filing to June 15, 1983, which coincided with the six-month anniversary of enactment. Mrs. Lowes' claim was filed after that date.

The discretion or jurisdiction given to the Board of Trustees under what is now section 15(12) of the Schedule to extend the time for filing a claim is separate from the authority granted to it under paragraph 3 of Section 15(1) of the Schedule whereby the Board is empowered to determine the eligibility of the claim. The discretion under Section 15(12) is absolute and not subject to review.

This Tribunal cannot assume jurisdiction, nor by interpretation, extend its jurisdiction to cases not clearly and unmistakably provided for by some statute.

Mrs. Lowes' claim was subject to condition barred by legislation, and since this Tribunal has no authority or jurisdiction either to extend the time for filing the claim or to review the decision of the Board of Trustees on this matter, the Tribunal rules that there is no entitlement by the Applicant, Florence Lowes, to a hearing under Section 16(3) of the Schedule to Regulation 938, as amended, under the Travel Industry Act.

BURNS H. PROUDFOOT

APPEAL FROM THE PROPOSAL OF THE LIQUOR LICENCE BOARD
OF ONTARIO

to amend the Terms and Conditions by extending the
hours of service from 10:00 to 11:30 p.m.;
to permit live entertainment in the form of
unamplified instruments;
the local community to be advised of any request for
renewal of licence or request for transfer or
licence.

RE:
PICCOLO CASTELLO TRATTORIA LTD.
(PICCOLO CASTELLO TRATTORIA RESTAURANT)

TRIBUNAL: STEPHANIE J. WYCHOWANEC, Q.C., CHAIRMAN, PRESIDING
WATSON W. EVANS, MEMBER
RONALD W. CHEMIJ MEMBER

APPEARANCES:
B.H. PROUDFOOT, acting on his own behalf
E.P. FIKSEL, representing the
Piccolo Castello Trattoria Restaurant
S.A. GRANNUM, representing the Liquor Licence Board

DATE OF
HEARING: 9 June 1986

REASONS FOR RULING

The Liquor Licence Board held a hearing to determine whether terms and conditions previously attached to the Dining Lounge Licence of Piccolo Castello Trattoria Restaurant should be removed. Following the hearing, the Board released its decision dated April 17th, 1986, wherein it extended the hours of service from 10:00 p.m. to 11:30 p.m. and permitted live entertainment in the form of unamplified instruments. The Board also ordered that before the Dining Lounge Licence is renewed in 1988, notice of renewal would be sent to "all the objectors who appeared at this 'Hearing' and, in fact, who have been served with a 'Notice of Hearing', and that those persons be permitted to object to the renewal of the licence..."

A copy of this decision was sent to a number of individuals amongst whom was Mr. Burns Proudfoot. None of the named individuals was identified as representing an association or other person. By letter dated April 25th, 1986, Mr. Proudfoot served notice on this Tribunal that he wished to appeal the Liquor Licence Board's decision. A copy of his letter was sent to the Board.

Shortly thereafter, the Tribunal was advised by Mr. Grannum, counsel for the Board, that "It would be my opinion that Mr. Proudfoot in his individual capacity has no status to appeal the Board's decision." That letter was followed by a letter from Mr. Fiksel, counsel for the licence holder, which stated in part "...Mr. Proudfoot does not have standing with regard to this hearing."

Section 14(1) of the Liquor Licence Act reads as follows:

- (1) Any party to a proceeding before the Board under section 12 who is aggrieved by the decision of the Board may, within fifteen days after he is served with the decision of the Board, mail or deliver to the Board and the Tribunal a notice in writing requiring a hearing by the Tribunal.

Sections 12(3) and 12(5) of the Act state that:

- (3) Every person upon whom a notice is served and any other person added by the Board is a party to the proceedings.
- (5) The Board shall hold the hearing and give its decision and reasons therefor in writing to the parties to the proceedings.

There are two questions to be determined by this Tribunal:

- (1) Was Mr. Proudfoot a party to the proceedings before the Board under section 12 in his personal capacity, and
- (2) if so, was he aggrieved?

It appears that when the Board determined that a hearing under Section 12 of the Act was required, it sent several letters to those persons who had earlier objected to the issuance of the licence. The following letter dated March 4th, 1986 (Exhibit 7) was sent to Mr. Proudfoot in his personal capacity:

As you know, Ms. Pingitore has applied to the Board to remove the terms and conditions that the Board had attached to her licence.

There are objections to the removal of these terms and conditions and a Board hearing must be held pursuant to Section 11 of the Liquor Licence Act.

A hearing will be held in the near future and you and the objectors will be notified of the time, date and place of the hearing. At the hearing, you will be allowed to express the concerns outlined in your letter of the 11th of November.

Meanwhile, the terms and conditions will remain in effect.

This letter was followed by another dated March 13th, 1986 (Exhibit 6) again addressed to Mr. Proudfoot in his personal capacity. It reads as follows:

This is to advise you that a 'Hearing' has been scheduled for the date Tuesday, April 8, 1986, at 1:00 p.m. to be held at these Offices, 55 Lake Shore Boulevard East, Toronto.

You are invited to attend this 'Hearing' so as to avail you of an opportunity to voice your objections to the removal of the existing term and condition which is attached to the 'Dining Lounge' Licence of this Licence Holder.

You may, of course, bring any other interested persons with you to the said proceedings.

Mr. Proudfoot attended at the hearing. He has stated before this Tribunal that he completed an attendance card for himself in his personal capacity and that he made representations and filed some documents during that hearing. He also stated that he did say that he was a member of the Nottawaga Creek Ratepayers Association but denies that he represented himself as President of that Association or that he made specific representations on behalf of the Association. He said his representations were made on his own behalf and on behalf of his mother who evidently owns the family property in that area.

In its decision, the Board had added as parties to the proceedings three Associations, one of which was the Nottawaga Creek Ratepayers Association. The decision outlines the submissions made to it, including those made by Mr. Proudfoot. It describes him as President of the Nottawaga Creek Ratepayers Association. The decision also listed the written objections it had received. Included in the list was the objection from Mr. Proudfoot again, evidently in his personal capacity.

Mr. Grannum directed the Tribunal to two earlier rulings issued by its predecessor the Liquor Licence Appeal Tribunal, both found in Volume 6 of the Summaries of Decisions of that Tribunal issued in 1982.

In the Brantford Harlequin Rugby Club decision, the Tribunal dealt with a situation similar to that before this Tribunal. A letter, as opposed to a formal notice of hearing, was sent to a Mrs. Kurmis and other complainants. The letter advised that a hearing had been scheduled for a particular date and time at the offices of the Board. It concluded with "You are invited to attend this 'hearing'. Please bring all interested parties with you." The Board hearing was held and attended by Mr. and Mrs. Kurmis, and a decision was rendered. The decision was appealed by the Kurmis'.

The Liquor Licence Appeal Tribunal held as follows:

The question is whether the letter of August 4th, 1981 (Exhibit 9) to Mr. F. Kurmis is a Notice of hearing within the meaning of the subsection. There is a clear distinction between the formal Notice of Hearing (Exhibit 3, Item 7) and the letter (Exhibit 9). The letter is a mere notification of the hearing to a person who is interested in the matter.

The Tribunal finds that the letter is not a notice of hearing within the meaning of section 12(3). It is a fact that no objector was added by the Board as a party to the proceedings. This power is able to be exercised by the Board before or after the hearing to be held. It was not exercised; indeed, there is no indication it was called upon to do so. Accordingly, the Tribunal finds that neither Mr. Kurmis nor any other objector is a party to a proceeding before the Board within the meaning of section 14.

The ruling in the Frank's Restaurant hearing dealt with the situation where initially a "formal" notice of hearing had not been served on a person who appeared before the Board, but the subsequent decision of the Board had been. The Liquor Licence Appeal Tribunal said:

The question is whether the letter of the 22nd of July, 1981 to Mr. Sharpe is a notice of hearing within the meaning of the subsection. The Tribunal has had an opportunity of commenting in this regard in an unreported decision (Brantford Harlequin Rugby Club issued on the 3rd of May, 1982). The Tribunal held that there was a clear distinction between the formal notice of hearing served upon on the Applicants and the letter which was served upon the person requesting the hearing. The letter was a mere notification of the hearing to a person who was interested in the matter. The Tribunal found that the letter is not a notice of hearing within the meaning of Section 12 (3). The Tribunal is relating its finding in that particular instance to that matter namely the issuance of a Special Occasion Permit. There is no direct evidence before the Tribunal whether or not the Board added Mr. Sharpe formally as a Party.

In this instance, reference can also be made to Subsection 5 where it is stated the Board "shall hold a hearing and give its decision and reasons therefor in writing to the parties to the proceedings". The Tribunal has before it the decision rendered by the Board and notes that a copy was sent to Mr. Sharpe, as it was to counsel for the Applicants. Accordingly the Tribunal finds that Mr. Sharpe was a party to the proceeding before the Board.

In addition to these two rulings, the Divisional Court in an unreported decision in Temple v. Liquor Licence Board et al, released in April 1983, examined the status of persons participating in a public meeting held pursuant to section 6 of the Liquor Licence Act. The decision of the Court related to a different set of circumstances, however, the following observation of the Court is noteworthy:

In a process where the public is given an opportunity to make representations, it is difficult to conclude that a person who attends the meeting and makes representations cannot be regarded as a party to that process.

Clearly, Mr. Proudfoot was a party to the proceedings. The letter advising him of the date and place of the Board's hearing was addressed to him personally; the decision was sent to him in his personal capacity; he attended the Board hearing and the Tribunal accepts his statement that he spoke on his own behalf. It may well be that, in part, he also spoke on behalf of others, but that of itself would not alter or change the capacity in which he appeared in the first instance. The Tribunal therefore finds that Mr. Proudfoot was a party to the proceedings before the Liquor Licence Board in his personal capacity.

The second issue is whether Mr. Proudfoot is aggrieved by the decision of the Board. The interpretation of the word "aggrieved" as used in the Liquor Licence Act has been previously considered by the Liquor Licence Appeal Tribunal. In the Frank's Restaurant ruling, the Tribunal states: "The

Tribunal is of the opinion that anyone whose concepts of needs and wishes have been decided against is aggrieved". The Tribunal finds that Mr. Proudfoot is aggrieved by the decision of the Board.

The Tribunal, therefore, has jurisdiction to hear the appeal brought by Mr. Proudfoot in his personal capacity.

Under Section 25(1) of the Statutory Powers Procedure Act, an appeal from a decision of a tribunal, in this case the Liquor Licence Board, to another appellate tribunal would operate as a stay of the matter unless this Tribunal otherwise orders.

Counsel for the licence holder has asked this Tribunal to exercise that authority. The Tribunal has considered the decision of the Liquor Licence Board and has weighed the possible negative impact of that decision, not only on the Applicant, Mr. Proudfoot, but on the public in the area, against the negative impact on the licence holder. Without in any way determining the merits of the appeal itself, the Tribunal is of the opinion that an order under section 25(1) is appropriate in the circumstances.

Therefore, by virtue of the general authority vested in it, the Tribunal finds that the Applicant, Burns Proudfoot, is entitled to require the Tribunal to hold a hearing pursuant to Section 14 of the Liquor Licence Act and that pursuant to Section 25(1) of the Statutory Powers Procedure Act, the appeal filed by the Applicant will not act as a stay of the Order of the Liquor Licence Board in this matter.